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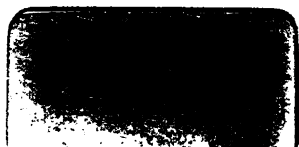
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EPITOME
OF THE
LAW OF ARBITRATION
AND
AWARDS.

BY
JOSHUA SLATER, Esq.,
OF GRAY'S INN,
BARRISTER-AT-LAW.

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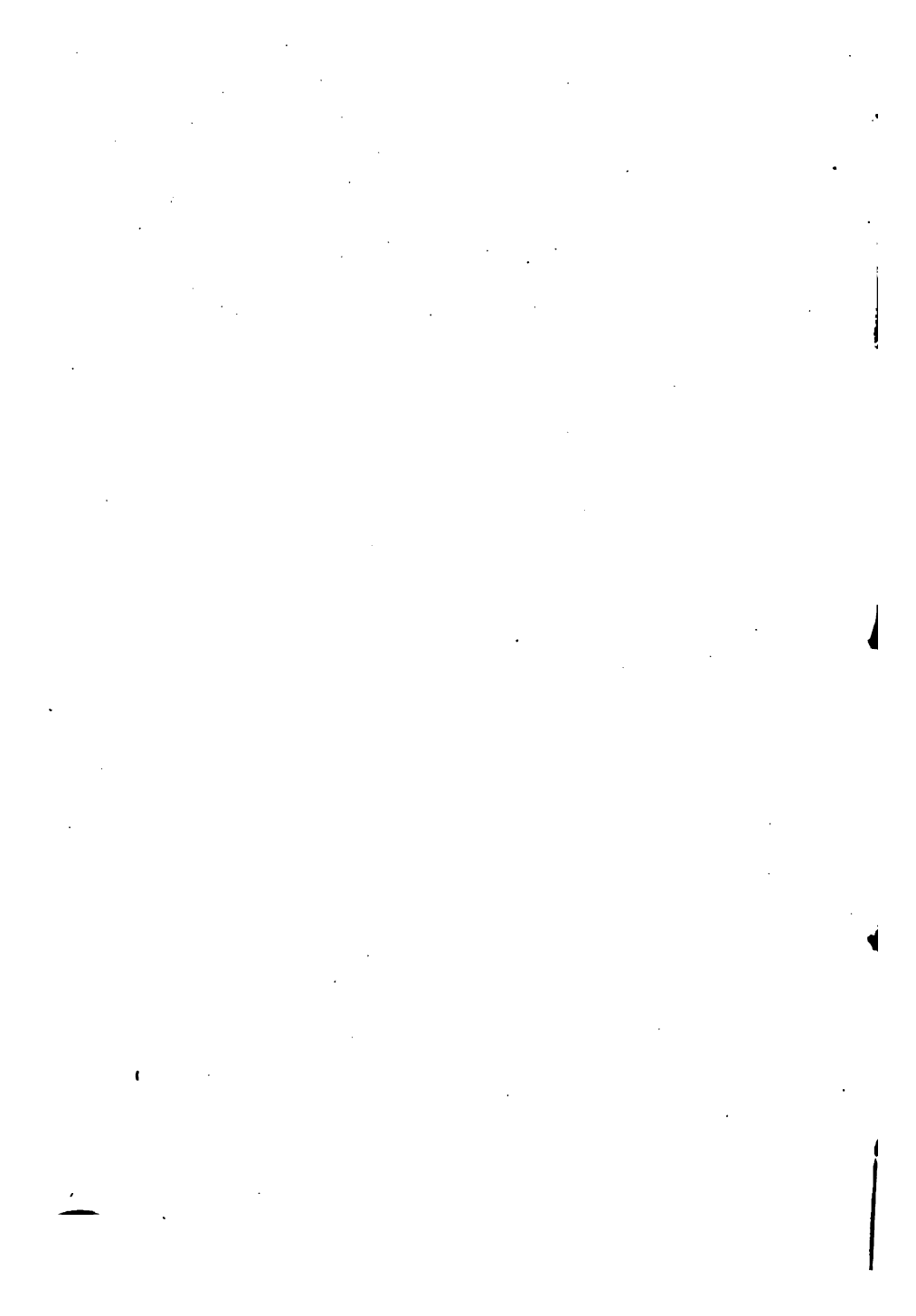


PREFACE.

It is hoped that the following pages will be found of use to a large and important class of the community who, although not members of the legal profession, have frequent occasion in the course of their business to consult books of law. The endeavour has been to bring the Law of Arbitration into a readable compass, and, as far as possible, to place it before the reader in language that he can understand. Having that object in view, law terms have, where possible, been dispensed with, and it is hoped that, so far as this endeavour is concerned, the end will justify the means. It will be found advisable to read the cases mentioned in the text, as they set forth many points in the Law of Arbitrations and Awards other than those they are quoted to illustrate. The forms in the Appendix are given as a frame-work, to be filled up as occasion may require, according to the ever changing varieties of actual practice.

J. S.

2, Middle Temple Lane, E.C.



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ABBREVIATIONS.

A. & E.	Adolphus and Ellis.
Anst.	Anstruther's Reports.
B. & A.	Barnwell and Alderson.
B. & Ad.	" Adolphus.
B. & B.	Broderip and Bingham.
B. & C.	Barnwall and Cresswell.
B. & L.	Browning and Lushington.
B. & P.	Bosanquet and Puller.
B. & S.	Best and Smith.
Bing. N. C.	Bingham's New Cases.
Burr.	Burrows.
Carth.	Carthew's Reports.
C. B.	Common Bench Reports, Old Series.
C. B., N. S.	" " " New Series.
C. & F.	Clark and Finelly.
C. & M.	Crompton and Meeson.
C. & P.	Carrington and Payne.
C. L. R.	Common Law Reports.
C. M. & R.	Crompton, Meeson, and Roscoe.
De G. M. & G.	De Gex McNaghten and Gordon.
De G. & Sm.	De Gex and Smale.
Drew.	Drewry's Reports.
Dr. & Sm.	Drewry and Smale.
Dowl.	Dowling's Reports.
D. & L.	" and Lowndes.
D. P. C.	" Practice Cases.
D. & R.	" and Rylands.
East	East's Reports.
E. & B.	Ellis and Blackburne.
E. B. & El.	Ellis, Blackburne, and Ellis.
Eq. Cas. Ab.	Equity Cases Abridged.
Esp.	Espinasse.

G. & D.	Gale and Davison.
Giff.	Giffard's Reports.
G. & H.	Giffard and Henning.
Gow.	Gow's Reports.
Hardw.	Hardwick's Reports.
H. & N.	Hurlstone and Norman.
H. & W.	Hurlstone and Walmsley.
Ir. C. L. Rep. . . .	Irish Common Law Reports.
Kay	Kay's Reports.
K. & J.	Kay and Johnston.
K. & G.	Kean and Gaunt.
Keb.	Keble's Reports.
L. J. (Q. B., C. P., Ex., Ch.)	Law Journal (Queen's Bench, Common Pleas, Exchequer, and Chancery).
L. M. & P.	Lowndes, Maxwell, and Pollock.
Lut.	Lutwych's Reports.
L. T.	Law Times.
M. & G.	Manning and Granger.
M. & Sel.	Maunder and Selwyn.
Mod.	Modern Reports.
M. & M.	Murdy and Malkin.
N. & P.	Neville and Perry.
Pop.	Popham's Reports.
Russ.	Russell's Reports.
Salk.	Salkeld's Reports.
Scott N. R.	Scott's New Reports.
Sid.	Siderfin's Reports.
S. & S.	Simons and Stuart.
Skin.	Skinner's Reports.
Sty.	Style's Reports.
T. R.	Term Reports.
W. Bl.	Sir Wm. Blackstone.
W. R.	Weekly Reporter.

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THE LAW OF ARBITRATION

AND

AWARDS.

CHAPTER I.

INTRODUCTORY.

IN a commercial age like the present, when men's minds are continually exercised by the law's delays, when complaints are heard from all quarters of the inadequacy of legal tribunals to deal with purely commercial questions, and when industrial centres, like Manchester, are beginning to form Courts of Arbitration, in order to avoid the uncertainty, cost, and waste of time that invariably attend the settlement of such questions in a court of law; at a time, in short, when everything of a commercial character points to arbitration *versus* law as the coming order of events, it will not be unadvisable to inquire what arbitration is, how it may be conducted, and to what results it may lead. Introduction.

To begin, therefore, at the beginning, let us ask, What is arbitration? What is Arbitration? Arbitration is defined to be

“The submitting of a matter in dispute to the judgment of one, two, or more persons, called arbitrators.” To constitute a valid arbitration, then, it appears there are three requisites: 1st, Parties to the dispute; 2nd, The agreement to refer the dispute to the decision of a third person; and 3rd, The appointment of such third person as Arbitrator and his acceptance of the office, for the appointment is not valid until it has been notified to the person chosen and he has accepted the post, as it would be obviously unfair to impose an office of responsibility like that of arbitrator upon any one without his consent to the transaction being first asked and obtained. The decision of the arbitrator is called an Award. The agreement to refer the dispute to the decision of a third person is called a Submission to Arbitration. This submission or agreement may be either verbal, in writing, or by deed. A verbal agreement, although valid, is open to this objection, that in common with all verbal contracts, the terms agreed upon are liable to be disputed; and it is most desirable that there should be no mistake in so important a matter as a submission to arbitration. Another objection is that a verbal submission cannot be made a rule of Court, so as to give the Court authority to enforce the decision of the arbitrator. A submission to arbitration should be, therefore, in writing, and point out clearly and distinctly the matters to be referred, and should also express the agreement of the parties to refer the said matters to the decision of a certain person, or persons, and also their willingness to be bound by such decision. Unless the parties

Arbitrator
must accept
appointment.

What is an
Award?

Submission to
Arbitration
may be
verbal, in
writing, or
by Deed.

Should not be
verbal.

Verbal sub-
mission
cannot be
made rule of
Court.

Should be in
writing,

and express
agreement
to refer.

intend to be so bound, the whole proceeding is an absurdity. A submission in writing, being a contract between the parties to it for the performance of certain duties, should be executed by them in the same way as an ordinary contract, and will require a 6d. stamp, unless the subject matter of dispute is less in value than £5; if less than £5, no stamp is required. The third method of making a submission—viz., by deed, is the one frequently made use of; and as a deed is the highest practical form of document known to the law, it can only be altered by a document of equal solemnity, so that a submission by deed cannot be altered, or the scope of it enlarged, either verbally or by a written agreement, but by deed only. Another form of submission used is by bond, where the parties enter into mutual bonds for the payment of certain penalties in case of their non-compliance with the award. Both a submission by deed and by bond require to be stamped, whatever the amount. A submission should always contain a clause agreeing that it may be made a rule of Court, so that the Court will then be able to give effect to the award, and also have power over the proceedings from the commencement. In connection with this part of the subject, it is enacted by the Common Law Procedure Act of 1854, that, "Every agreement or submission to arbitration by consent, whether by deed or instrument in writing, not under seal, may be made a rule of any of the superior Courts of Law or Equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not

Submission in writing should be executed by all the parties.

Submission should be by Deed.

Submission by Bond.

Submission should be made rule of Court.

C. L. P. Act, 1854.

Submission
may be
altered,
amended, or
enlarged.

Deed, when
necessary.

Submission
revoked by
Death,

not by Bank-
ruptcy.

Compulsory
submission,

where
matters in
dispute are
matters of
account.

be made a rule of Court." And although the "Superior Courts of Law at Westminster" no longer exist, the law remains the same, and the Common Law and Chancery Divisions of the High Court can still equally exercise their jurisdiction. A submission may be altered, amended, or enlarged, at any time before the award is given by the consent of the parties thereto, but, as has been already said, a deed is requisite for the purpose where a deed was originally used. If either of the parties to a submission die during the proceedings, or at any time before the award is given, the submission is revoked, and the authority of the arbitrator is at an end. But such a result would not arise from the Bankruptcy of either of the parties.

So far, we have spoken only of submissions by consent; there are, however, various other modes of submission of a compulsory nature, *e.g.*, references under the Common Law Procedure Act of 1854, providing for the compulsory reference of actions as where the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, and section 57 of the Judicature Acts of 1873 provides in such cases that the Court or Judge, without any consent of parties, may order any question of account to be tried before an official referee, or a *spécial* referee agreed on by the parties. Such referee must proceed from day to day, and has the same powers as a judge, except of commitment or of enforcing orders. There are also submissions in Bankruptcy—by order of Quarter Sessions—by order of County Court Judge—and by

Record, all of which refer to suits before one or other of the different Courts, and which are referred for the convenience of the parties to the action. The matters in dispute are not unfrequently submitted to the decision of two arbitrators, one for each of the parties concerned; in that case, an umpire is chosen by the arbitrators to decide the questions, if there should be a difference of opinion between them. And as that almost invariably happens, the responsibility of giving a final decision is thus thrown upon the umpire; thereby practically leaving the settlement of the question to the decision of one man, so that the advantage of having two arbitrators does not seem very apparent. Again, in such a case there is this danger, that each of the arbitrators is apt to regard the party for whom he acts as his client, and to let such idea influence his decision. That this danger exists is shown in the case of *Oswald v. Grey*, where it appeared in evidence that each of the arbitrators had considered himself interested for the party who had chosen him in that case, and Lord Justice Erle remarked:—"This is a notion that ought to be strongly repudiated, and that it is wrong for an arbitrator so nominated to consider himself appointed to take care of the interests of one party only, and not of the other."

In case of two arbitrators.

Not desirable to have two arbitrators.

Why not desirable.

CHAPTER II.

WHO MAY BE PARTIES TO A REFERENCE.

Who can
contract.

All persons
who can con-
tract can be
parties to
Arbitration.

Infants
cannot.

Father or
guardian of
infant may
refer.

Equity will
not bind
infant.

IN a submission to arbitration, as in every other contract, there are persons under disability either on account of age; on account of not being in their right minds; or on account of not being able to enter into a contract: so that in answering the question, who may be parties to a submission, it may be stated, as a broad principle, that every person who can enter into a contract can make a submission to arbitration. Infants cannot make a binding contract, except for necessities; they cannot therefore, as a rule, be parties to a submission; and if an infant is a party, he is not bound by the award of the arbitrator, but can, upon his coming of age, either accept it or avoid it altogether. The father or guardian of an infant, may, however, bind himself for the infant's performance of an award, so far as that award lays upon the infant some obligation that he can perform whilst he is a minor. Equity will not award a decree to bind an infant, but the court will sometimes, in an action to which an infant is a party, refer the matter to the Master to inquire whether it would be to the advantage of the infant, that the action should be referred to arbitration, and will act in accordance with the Master's report. (*Davis v. Page*, 9 *Ves.*, 350).

It was originally considered that a married woman was amongst the persons who were incapable of making a submission, but the effect of subsequent

legislation has improved her position in that respect.

A married woman, as a trader in the City of London occupies an anomalous position; she can sue and be sued in her own name, can also be made bankrupt, and is considered, in fact, for business purposes, a

Married woman as trader in City of London may be party.

feme sole, and, therefore, can submit all matters in connection with such business to arbitration, and that, it is presumed, without her husband's consent. If a married woman is judicially separated from her husband, or if she has obtained a protection order, she may, so far as her separate property is concerned, be a party to a submission. So may the wife of a man undergoing a sentence of penal servitude, that is, during the term of his imprisonment. What effect the Married Women's Property Act of 1882 will have upon a married woman's powers of entering into a contract, or how far it will enlarge the powers at present existing, remains to be seen, and judicial decisions upon the construction of the Act will be awaited with great interest.

Wife of felon may.

In matters of business where the authority of the principal has to be delegated to another, it often becomes a question as to how far the agent can bind his principal. Now, it appears in the matter of making a submission to arbitration, the agent can bind his principal in matters in which the said agent has authority to act; but, in order to make a valid submission under those circumstances, he must make it in his principal's name and not in his own, for if he make it in his own name, the agent, and not the principal, will be bound by the award, and it will be no objection that the agent had no interest in the

When agent can bind his principal by a submission.

Partner has
no implied
authority to
bind
co-partner.

Parties
jointly
interested.

Lunatic
cannot refer,

his commit-
tee may, by
order of
L.J.J. refer.

Trustees may
refer.

Executors
and
administra-
tors liable for
devastavit.

subject of the dispute. (*Bacon's Abr. Arb., C.*) A partner has no implied authority, by reason of his partnership, to bind his co-partner or partners in any matter, even though the matter in dispute has connection with the business of the firm, for that purpose, therefore, he must have special authority. A person not under disability may, as has been shown, submit to a reference with respect to his own affairs; he is not, however, allowed to bind others as well as himself; but in case he submit for himself and others jointly interested in the subject matter of dispute, he alone will be bound by the award. Persons having joint and several interests in any matter in dispute are bound jointly and severally, and each is liable to the performance of the whole award. A lunatic, being a person incapable of entering into a contract cannot submit, but his committee may, by order of the Lords Justices who have jurisdiction over lunatics, refer on his behalf. Trustees may also refer matters in connection with their trust estates to arbitration, and it seems doubtful whether by so doing they may not make themselves personally liable. In all such cases, therefore, they should make doubt a certainty by having a clause inserted in the submission that they incur no such liability. There seems to be no doubt that an executor or administrator renders himself personally liable by a submission to arbitration, and that if the award does not give him the amount to which he would be entitled at law, he will be liable to the payment of the deficiency, as the fact of being party to a submission is *prima facie* evidence that he has sufficient assets in hand to

meet the award. (*Bacon's Abr. Arb., C.; Comyn's Digest Admin.*) Counsel, it appears, may bind their clients by an agreement to refer to arbitration, even without the consent of such clients having been obtained.

A counsel can bind his client by a submission.

Trustees of a bankrupt may (32 & 33 Vict., c. 71, s. 27), by the consent of the Committee of Inspection, submit to arbitration any question arising out of the bankrupt's estate, but the bankrupt himself cannot make a submission respecting his estate that is binding upon his trustee, and if he do make such submission, he, and not his estate, is personally liable. A solicitor or attorney acting for a client has, it would appear, the power to bind such client by a submission; and if by so doing he exceed his authority and act contrary to his client's express instructions, the client has his remedy by an action against such attorney, although the client is bound by the award. (*Filmer v. Delber*, 3 Taunt., 486 *Bacon's Abr. Arb., C.*) Railway Companies, Joint Stock Companies and Corporations, can submit matters in dispute to arbitration; their power to do so being derived from various enabling statutes passed for that purpose, and which we shall hereafter more particularly notice.

Trustees of Bankrupt may refer,

but not the Bankrupt.

Solicitors have the power to bind a client by a submission.

Railway and Joint Stock Companies may submit.

WHAT MAY BE REFERRED.

Bacon, in his abridgment of the law, title Arbitration, says:—

"It is holden clearly that all chattels personal, and personal actions, such as trespass, conspiracy, &c., may be determined by arbitration," and the

What may be referred.

Breaches of contract.	law in that respect remains the same ; so that all disputes respecting personal property, and all actions for personal injury or wrong, may be submitted to arbitration. In fact, all breaches of contract, being matters of personal wrong, are amongst those things which may be referred.
Subject matter must be legal.	Of course, the subject matter of the arbitration must be legal; and there must be no fraud on the part of any of the parties to the reference. Fraud, in this matter, as in an action before the Courts, would vitiate the whole of the proceedings; and if the award had been given, it would be void, so that parties to an arbitration must act in accordance with the maxim of equity, which says, "He who comes into equity, must come with clean hands." In refer-
9 & 10 Wm. III. c. 15, s. 2.	ence to this, section 2 of the Act 9 & 10 Wm. III. c. 15 may be read: "And be it further enacted by the authority aforesaid that any arbitration or umpirage (<i>i.e.</i> , decision of an umpire), procured by corruption or undue means, shall be judged and esteemed void, and of none effect, and accordingly be set aside by any Court of law or equity." "Now causes matrimonial seem not arbitrable, because marriage ought to be free; and religion disallows the severing those whom the church hath joined" (<i>Bacon's Abr. Arb., A.</i>); but the damages sustained by a breach of promise, or anything relating to a marriage portion, may be submitted, also the terms of a separation. A suit for divorce, however, cannot be referred to arbitration or taken out of the hands of the judge who has jurisdiction in such matters. It appears, however, that questions as to whether there exists a sufficient
Causes matrimonial.	
Breach of promise.	
Suit for divorce.	

cause for a separation between husband and wife may be referred. In the case of *Rodney v. Chambers*, 2 East, 283, the Court of King's Bench held that the husband's covenant to allow his wife a separate maintenance, in case a separation should take place, with the approbation of the trustees to the marriage settlement, was a legal and valid covenant; and Mr. Justice Lawrence observed:—

Terms of
separation.
Rodney v.
Chambers.

“We thought there was nothing illegal in the parties agreeing to refer the question as to what was a good cause of separation, to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce.” (*Macqueen, on Husband and Wife*, 2nd Edit., p. 377.)

Questions arising from partnership disputes may also be made subject to a reference (*Russell v. Russell*, 14 Ch. Divn., 471); and where the question arises whether the matters in dispute are within the agreement for arbitration contained in the partnership deed, the Court will decide and not leave it to the arbitrator. (*Piercy v. Young*, 14 Ch. Divn., 200). Agreements to refer future disputes to arbitration, although no present cause of disagreement exist, will be enforced by the Court. Section 11 of the Act. 17 & 18 Vict., c. 125, provides: “That whenever the parties to any deed shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and one party begins an action after such agreement, the court or judge may stay proceedings. Disputes arising as to the construction of a will, may also be made the subjects of a reference by the executors or trustees of a testator in the case of

Partnerships.

Future
disputes.

Differences
arising out of
wills.

Causes
Criminal.

differences arising between the parties entitled under it and themselves. "Causes Criminal are not arbitrable, because they ought to be punished for the common good." (*Bacon's Abr. Arb., A.*) This refers to matters purely criminal; for where a person has a criminal and civil right of action against another, it appears that the matter may be referred; as in cases of assault, libel, and other matters of the same character, where the party injured has a remedy by action as well as by indictment, and that although a criminal prosecution has been commenced. (*Bacon's Abr. Arb., C.*)

Real
property.

Questions affecting the right of the freehold of land could not formerly be dealt with by arbitration or the property transferred by an award, "therefore there cannot be a partition by an award." (*Bacon's Abr. Arb., A.; Comyn's Digest Arb., D., 3.*)

Partition of
lands may be
made by
Arbitration.

In this respect there have, however, been great changes, and there are now many questions affecting land that may be, and are, continually submitted to arbitration, and it appears from the decision of the court, in the case of *Knight v. Burton*, 6 Mod., 231, that a partition of lands of joint tenants and tenants in common may be made by arbitration. Russell, in his work on arbitration, 6th edit., p. 4, mentions the following matters in connection with land that can now be referred to arbitration, and quotes the following cases:—Settlement of disputed boundaries (*Taylor v. Parry*, 1 M. & G., 604); questions between landlord and tenant respecting waste (*Hunter v. Rice*, 15 East, 100); questions of title to land by devise (*Downs v. Cooper*, 29 Q. B., 256); and

Settlement of
disputed
boundaries.

Questions
between
landlord and
tenant.

Title to land
by devise.

questions of title to land in general. (*Doe d. Morris v. Rosser*, 3 *East*, 15.)

To land in general.

It seems probable that a general agreement to sell property "at a fair valuation" may be enforced, and the Court will, if necessary, direct a reference to ascertain the price; but it appears that where the mode of valuation is specified—it must be strictly followed—for instance, where the price is to be determined by A and B, or an umpire to be selected by them, and they fail to agree upon the price or to name an umpire, the Court can give no relief. (*Milnes v. Gery*, 14 *Ves.* 400-417 *Dart. Vendor and Purchaser*, 5th Edit., p. 221).

Agreement to sell land at a fair valuation.

Questions of account, especially where the accounts are of a voluminous character, may, with great advantage, be submitted to arbitration. These questions usually arise in cases of partnership disputes, and disputes between principal and agent. They are, moreover, questions that the law admits "cannot be conveniently tried in the ordinary way," as they require a special knowledge for their proper elucidation and settlement, which the law does not possess. They are therefore usually referred by the Court, when they arise, to an arbitrator, under the powers conferred by statute on the Court for that purpose, and the C. L. P. Act, 17 & 18 Vict., c. 125, s. 3, directs "that if it be made to appear at any time after the issuing of the writ, to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot be tried conveniently in the ordinary way, it shall be lawful for such Court or Judge upon such application, if

Questions of account.

17 & 18 Vict.,
c. 125, s. 3, as
to accounts.

they or he thinks fit to decide the matter in a summary way, either wholly or in part, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court . . . upon such terms, as to costs and otherwise, as such Court or Judge shall think reasonable; and the decision of such Court or Judge; or the award, or certificate of such referee, shall be enforced by the same process as the finding of a jury upon the matter referred." But by the Judicature Acts, 1873, a great and important change has been made in the procedure by the appointment of official and special referees, to whom all matters in an action that necessitate a reference may be referred. 36 & 37 Vict., c. 66, s. 57, provides, "In any cause or matter (other than a criminal proceeding by the Crown) before the High Court in which all parties interested, who are under no disability, consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts . . . which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury, or conducted by the Court through its ordinary officers, the Court or a Judge may, at any time, on such terms as may be thought proper, order any question of account arising therein to be tried either before an official or special referee, to be agreed on between the parties, and any such special referee so agreed upon shall have the same powers and duties, and proceed in the same manner, as an official referee." In the case of *Nolan v. Copeman* (8 L. R., 8 Q. B., 84), which was a case

Judicature
Acts, as to
accounts.

involving an inquiry into a mass of accounts, an order was made by the Judge, on the application of the plaintiff, that an accountant, to be named by the arbitrator, should inspect the defendants' books, and take copies or extracts from them relating to the matters in question. This was done, and the charges of the accountant were paid by the plaintiff. The result of the investigation, and report of the accountant, was, that much expense in the inquiry was saved. Held that the plaintiff, in whose favour the award was made, was not entitled to the costs of the accountant, but must pay them himself. Formerly there was not such occasion for arbitration as exists at present. There were no railways or other large companies, and the wealth of the country consisted chiefly of land and the proceeds of agriculture. Trade had not reached its present dimensions, and steam had not brought us into a measurable distance with the ends of the earth. Under these circumstances arbitration was not often resorted to, as the Courts of Law were not, as at present, overcrowded with work, and had ample time to deal with the various questions that came before them; but with increased capital came increased commercial vigour; with increased commercial vigour came increased necessity for arbitration; and now, when railways have expanded throughout the length and breadth of the land, when joint stock companies, building societies, and corporations generally, have increased and multiplied, it has been found necessary to enlarge the scope of arbitration and to pass various acts of parliament for the purpose of enabling these new ventures to acquire the powers

8 & 9 Vict.,
c. 18, s. 23.

22 & 23 Vict.,
c. 59, Railway
Cos. may
mutually
refer.

8 & 9 Vict.,
c. 16.

and the land necessary for their ultimate development, and to provide for the manner in which the question of compensation to be paid for such land may be settled. The L. C. C. Act, 1845, provides for the compulsory obtaining of lands by any railway, and in section 23, it is enacted that where "the compensation claimed or offered in any such case shall exceed £50 it shall be settled by arbitration," and by the Act 8 & 9 Vict., c. 20, ss. 6, 44, the compensation for land taken or used for the purpose of the railway, or injuriously affected by its construction, and for damages in respect of such land, shall be ascertained and determined in the manner provided by the L. C. C. Act, 1845, in respect of lands purchased or taken under its provisions, and it further provides for the settlement of disputes by arbitration. By 22 & 23 Vict., c. 59, any two or more railway companies are enabled to refer to arbitration their differences, questions, or other matters whatsoever, in which they are then, or thereafter shall be, mutually interested, and which they might lawfully settle or dispose of by agreement between themselves; and 37 & 38 Vict., c. 40, s. 6, directs that the Board of Trade may refer to the Railway Commissioners any dispute in which a railway company is a party. Joint stock companies are also empowered to obtain lands for undertakings of a public nature, and also to refer disputes arising thereupon to arbitration, by the 8 & 9 Vict., c. 16. Disputes between masters and workmen as to payment of wages, hours of work, injury or damage done to the work, any delay in finishing the work, &c., may be settled by arbitration, in accordance with the pro-

visions of the Acts 5 Geo. IV., c. 96, and 35 & 36 Vict., c. 46. The Public Health Act, 1875, 38 & 39 Vict., also provides that in case of dispute the amount of compensation to be paid by any person or persons within the provisions of the Act are to be settled by arbitration. It will be seen that there are now many matters which can be referred to arbitration, and it is a matter of importance to know how these various matters may be referred. They may be referred in four ways.

Public Health Act.

1. By consent of the parties.
2. By compulsory order of the Court under the C. L. P. Act, 17 & 18 Vict., c. 125, ss. 3, 17.
3. By order of the Court or a Judge.
4. Under the Judicature Acts, to an official or special referee.

How submission may be made.

CHAPTER III.

MODES OF SUBMISSION.

We have before spoken of a submission by consent of the parties, and shown that it may be either parole, by agreement in writing, or by deed, and the necessity there is why it should be made a rule of Court. 9 & 10 Wm. III., c. 15, s. 1, says, "It shall and may be lawful for all merchants and traders and others desiring to end any controversy suit or quarrel, for which there is no other remedy but by personal action or suit in equity, by arbitration to agree that

Consent of parties.

Submission to be made rule of Court.

their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of His Majesty's Courts of Record, which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, and that such agreement, in their submission, or promise, or bond upon affidavit of the witnesses thereto, shall thereupon be made a rule of the said Court, and enforced in the manner therein mentioned." A clause should be inserted in every submission, expressing the consent of the parties that it be made a rule of Court and specifying of which division of the High Court it is intended to make it a rule. The proceedings are then clothed with all the dignity of the Courts themselves, and the award can be enforced in the same way as a judgment of the Court. It would appear from the above section, that in order to make the submission a rule of Court, the parties to it should "insert such, their agreement in their submission," but by s. 17 of the C. L. P. Act, 17 & 18 Vict., c. 125. "Every agreement or submission to arbitration by consent, whether by deed or in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster on the application of any party thereto." Until that submission has been made a rule of Court, the Court has no power over the proceedings, cannot compel the attendance of witnesses, or enforce, or set aside the award of the arbitrator, or in fact, exercise any jurisdiction whatever in the matter. A

Agreement to
be inserted in
submission.

submission cannot however contain any clause taking away from the courts any jurisdiction that they may have in the decision of a matter; for any agreement the object of which is to prevent a suffering party from coming for redress into a Court of Law, or in other words, any agreement which ousts the Courts of their jurisdiction, is void on grounds of public policy (*Broom's Commentaries on the C. L.*, 6th Edit., p. 53. *Hart v. Hart*, 18 Ch. Div., 670); although it appears that any matter in the case that does not touch "the root of the action" may be made a subject of agreement. The submission should also be precise as to the exact matters which the parties to the agreement wish to have decided especially in cases where there are two arbitrators, as unless they each have a clear notion and agreement as to what they have to decide, a satisfactory result can scarcely be expected.

Submission must not interfere with jurisdiction of Courts.

Must not touch root of action.

Should be precise.

The second mode of submission to arbitration is as we have said, by compulsory order of the Court under the C. L. P. Act. 17 & 18 Vict., c. 125, and in reference to this, sect. 6 of the act provides that if upon the trial of any issue of fact by a Judge under the act, it shall appear to the Judge that the questions arising thereon, involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties or to an officer of the Court or in Country, upon such terms as to costs and otherwise, as such judge shall think reasonable, and the award, or certificate of such referee shall

Compulsory reference under C. L. P. Act, 17 & 18 Vict., c. 125.

Matters of
account only
to be referred.

have the same effect as hereinbefore provided as to the award or certificate of a referee before trial, and it shall be competent for the Judge to proceed and dispose of any other matters in question, not referred in like manner, as if no reference had been made. Under this section, questions have arisen as to the power of a Judge to refer "all the other issues in an action," as well as "matters of account," to an arbitrator. In the case of *Clow v. Harper*, 3 *Ex. Div.* 198, it was held that by the above section, the Judge had the power to refer such matters of account only, and must try any other issue in the case, in the ordinary way; but in a case also tried since the passing of the Judicature Acts, viz.: (*Ward v. Pilley*, 5 *Q. B. Div.*, 427); it was held that in any case in which the Court has jurisdiction to refer compulsorily a question of account to an official referee, under sect. 57 of the Juridicture Acts, it has also power to refer all the other issues in the action, that is of course so long as they do not involve questions of law.

By section 3 of this act, "the reference may be made at any time after the issuing of the writ, so that the action must have commenced before the Judge has jurisdiction to interfere; although the Judicature Acts have made no change in the law of arbitration, they have made great changes in the mode of procedure, and it will be well therefore to give those sections of the acts which bear upon this subject. With respect to procedure (see s. 21, *Jud. Acts*, 1875), where the act and rules contain no provision in point, and there was a variance between the practice of the

Common Law and Chancery Courts, that practice which appears on the whole most convenient, will now be adopted; for instance, where there was a written submission to arbitration, the practice at Common Law was to make the submission a rule of Court; while in equity the award only, and not the submission, was made a rule of Court. Held in *Jones v. Jones*, 14 Ch. Div., 598, C. A., that the Common Law practice was the more convenient of the two, and is to be adopted for the future. The third mode of submission is by order of the Court or a Judge, and as to this it appears that where the matter intended to be submitted to arbitration, is the subject of an action pending in the High Court of Justice, the action may, by consent of the parties, be referred at any time before trial by Judge's order, or rule of Court.

C. L. practice to be followed.

Submission by order of Court or Judge.

A cause may also be referred by an order of the Court when it is called on for trial, with, or without, a verdict being taken, as the parties may think proper. If the action is to be referred before trial, a Judge's order may be obtained for the purpose, and the order should direct that all proceedings should be stayed, but if there is no action pending before the Courts, the submission cannot be made by rule or order of the Court, except by consent of parties. *Chitty Archbold*, 13th Edit., 1309.

Cause may be referred before trial.

The fourth mode of submission is under the Judicature Acts to an official or special referee. The sections of the Judicature Acts that more especially affect the procedure in arbitrations are given here in their entirety so as to present a clear idea of the

Official or special referee under Judicature Acts.

present form of submission and the changes that have been effected in the procedure in arbitration by recent legislation. We will afterwards proceed to consider the position of the arbitrator and the powers that devolve upon him, and the responsibility that he undertakes in such position.

Section 56 of the Act says :—

Judicature
Acts as to
procedure.
Sect. 56.

Subject to any rules of Court, and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice, or before the Court of Appeal, may be referred by the Court or by any Divisional Court, or Judge before whom such cause or matter may be pending for enquiry, and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The High Court, or Court of Appeal, may also, in any such cause or matter as aforesaid in which it may think it expedient to do so, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors.

As to fees to
be paid.

The remuneration, if any, to be paid to such special referees, or assessors, shall be determined by the Court.

Sect. 57.
As to
accounts.

Section 57 refers to matters requiring prolonged examination of accounts, or any scientific or local investigation, and has been already given.

Sect. 58.

Section 58. In all cases of any reference to, or trial

by referees under this Act, the referees shall be deemed officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court, or (subject to such rules) by the Court or Judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall (unless set aside by any court) be equivalent to the verdict of a jury.

Referees deemed officers of the Court.

Section 59. With respect to all such proceedings before referees and their reports, the Court, or such Judge as aforesaid, shall have in addition to any other powers the same or the like powers as are given to any Court whose jurisdiction is hereby transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively by the C. L. Procedure Act, 1854.

Sect. 59. Powers of Court.

Sec. 83, provides for the appointment of official referees who shall perform the duties entrusted to them, whether in London or in the country, as may from time to time be directed or authorized by any order of the said High Court, or of the Court of Appeal. In all these cases it must be remembered that the Court, or Judge, do not abdicate their judicial position by the modes of reference, and cannot refer questions of law, even with the consent of the parties.

Sect. 83. Appointment of official referees.

Order 36, rule 29 aa. provides for the distribution to the official referees in rotation of the business referred. Order 36, rule 29 b. says that when an order shall have been made referring any business to the official referee in rotation, such

Official referees to act in rotation.

order or a duplicate of it shall be produced to the registrar's clerk, whose duty it is to make such distribution as aforesaid, and such clerk shall, except in the case provided for by rule 29 c. of this order, endorse thereon a note specifying the name of the official referee in rotation to whom such business is to be referred; and the order so endorsed shall be sufficient authority for the official referee to proceed with the business so referred.

Order to refer to particular official referee.

Rule 29 c. The two last preceding rules of this order are not to interfere with the power of the Court; or of a Judge at Chambers to direct or transfer a reference to any one in particular of the said official referees where it appears to the Court or Judge to be expedient, but every such reference shall be recorded in the manner provided.

Enforcing attendance of witnesses.

Rule 31 provides that, subject to any order to be made by the Court or Judge ordering the same, evidence shall be taken at any time before a referee and the attendance of witnesses may be enforced by subpoena; and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials before a Judge of the High Court, but not so as to make the tribunal of the referee a public Court of Justice.

No authority to commit.

Order 36, rule 33, says, "Nothing in these rules contained shall authorise any referee to commit any person to prison, or to enforce any order by attachment or otherwise."

Hours of sitting of official referee.

Order 41, rule 4 b. The official referees shall sit, at least, from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter, and Trinity sittings

of the High Court of Justice, except on Saturdays during such sittings, when they shall sit, at least, from 10 a.m. to 2 p.m., but nothing in this rule shall prevent their sitting on any other days. It will be seen that the position of a referee is clearly defined by the Judicature Acts and the rules made by the Judges, and as the question of fees is an important one in connection with this, as well as with other matters, and one that cannot be ignored on the one hand, or too clearly understood on the other, it will be as well to give, in extenso, the order made by the Judges on the 24th April, 1877, rescinding a previous order of 1st February, 1876. The order is as follows :—" From and after the date hereof the fee to be taken by an official referee attached to the Superior Court in respect of all matters, questions, or issues referred to him by any order shall be the sum of £5 for the entire reference, irrespective of the time occupied, which sum shall be paid before the reference is proceeded with.

Order regulating fees.

Every fee shall be collected by means of a stamp or stamps to be affixed to the appointment paper or summons issued by the official referee for appointing the time and place for proceeding with the reference. Where the sittings under a reference are to be held elsewhere than in London, a convenient place in which the sittings may be held shall be provided to the satisfaction of the official referee, by and at the expense of the party proceeding with the reference, and there shall be paid, in addition to the above fee of £5, £1 11s. 6d. for every night the official referee is absent from London on the business

Fee to be collected by stamp or stamps.

Fee when official referee

and his clerk are acting out of London.

of the reference, and 15s. per night for his clerk, together with the reasonable expenses of their travelling from London and back. A deposit on account of expenses may be required before proceeding with the reference, or, at any time during the course thereof; and a memorandum of the amount deposited shall be delivered to the party making the deposit.

Fees, &c., to be paid by party proceeding with reference.

The fees, expenses, and deposit (if any) hereby authorized in respect of any reference, shall be paid in the first instance by the party proceeding with the reference.

The official referees shall conform to all regulations that may be made from time to time by the Treasury for the accounting for all monies received by them. This order is made with the concurrence of the commissioners of H. M. Treasury.

Official referees are not arbitrators.

These, then, are the four modes by which a submission to arbitration can be made, and, although the Judicature Acts have greatly changed the procedure, they have not in any way interfered with the law of arbitration and awards as it existed before the passing of the Acts, neither have the official referees taken the place formerly occupied by the arbitrator. The official referee under these Acts can only inquire and report to the Judge upon the question submitted to him, whereas the arbitrator is a Judge of the law as well as of the facts of the particular case submitted for his decision.

We have dwelt somewhat at length on the Acts on account of their great practical importance, and in order that the procedure under them should be

clearly shown to, and understood by, those outside the profession of the law.

MATTERS INCLUDED IN THE SUBMISSION.

A submission, as we have said, should state clearly what matters the arbitrator's award is to include. His authority may be general, *e.g.*, may extend to "all matters in dispute between the parties," in which case the arbitrator will be empowered to consider and adjudicate upon all disputes affecting the civil rights of the parties to the submission, even, as it seems, including claims made by or upon them in the character of executors and administrators (*Comyn's Digest. Arb., D., 4*); or it may be of all matters in dispute "between the parties in the cause," in which case no questions, except those that arise in the cause, can be adjudicated upon, or brought before the arbitrator. There may be a submission "of all demands," in which case the title to land would be included. A submission of "all actions" does not include causes of action, but extends only to the actions in course of progress at the time of submission, but causes of action are included in a submission of "all actions and complaints." (*Comyn's Digest. Arb., D., 4*.) A submission of all debts includes judgment as well as simple contract debts. On a reference of "every dispute arising out of a contract" it appears that the meaning of the contract itself may come under the decision of the arbitrator. (*Thorburn v. Barnes, L. R., 2 C. P., 384.*) A claim may be made in the submission

Submission should be precise in its terms.

All matters in dispute between the parties.

What is included in disputes "between the parties in the cause."

"All actions."

All debts.

"Every dispute arising out of a contract."

Claim made

and abandoned.

and afterwards abandoned, in which case it does not become a part of the submission, as it has, by reason of its withdrawal, ceased to be a matter of difference between the parties. All the above expressions, in various submissions, have been made matters of judicial decision, and will serve to show the necessity there is for precision and clearness in drawing up the submission, in order to avoid the cost and annoyance that always attend irregularity, not only in arbitration, but in every affair of life. That negligence does not pay in matters connected with business is well-known to those whose duty it is, more especially, to investigate "matters requiring any prolonged examination of documents or accounts," which cannot conveniently be made before a jury, and which, as we have seen, are frequently made matters of reference: but it frequently happens that however carefully the submission may be framed, occasions do arise when it is found necessary to alter it.

ALTERATION OF SUBMISSION.

Alteration must be before award.

The alteration can be made by consent of the parties at any time before the arbitrator gives his award; and when the submission is voluntary and does not come under any of the statutes mentioned, and is not by order of the Court, the Court has no jurisdiction to alter or set aside the submission. If the matters referred to the arbitrator are differences in a cause which has already commenced, the submission cannot be altered so as to include causes of action

Causes of action subsequent to writ cannot be included.

that arose subsequent to the issue of the writ. The alteration must be made by an instrument of as solemn a nature as the submission; and if a deed was used for that purpose, the alteration must be by deed also.

When alteration to be by deed.

When the alteration of the submission is made by the Court, it has no power to alter the terms of the submission so as to introduce new matter and thereby virtually to alter the character of the submission; but if the alteration is a material one and changes the character of the document, there must be a consent of the parties. (*Smurthwaite v. Richardson*, 15 C. B. N. S., 463. *Cross v. Metcalfe*, 5 A. & E., 800.)

Court has no power to alter terms.

If alteration material must be by consent.

ENLARGEMENT OF SUBMISSION.

A time for giving the award should also be inserted in every well drawn submission, and if such time expires before the award is given, the authority of the arbitrator expires with it. In order therefore to avoid waste of time, the arbitrator is empowered, when necessary, to enlarge the time for giving his award, which he could not do without such authority, nor in the absence of it, would there be any implied admission on the part of the arbitrator to give his award within a reasonable time. By the C. L. P. Act, 17 & 18, Vict., c. 125, s. 15, it is provided that where the arbitrator does not give his award within the specified time, the Judge, in his discretion, has power to enlarge the time. (*Denton in re Denton v. Strong*, L. R., 9 Q. B., 117.) The enlargement of time, where necessary, must be

Time for award to be inserted in submission.

Judge's power to enlarge.

May be enlarged by implication.

May be made verbally, by consent.

Enlargement by Statute 3 & 4 Wm. IV., c. 42.

made before the original time fixed in the submission has expired, and may be made in any way that expresses the intention of the arbitrator, *e.g.*, if within the time fixed upon for giving his award he makes an appointment with the parties to the submission for a meeting in connection with the arbitration, such meeting to take place at a date beyond the limit fixed for giving his award, and no objection is made by either of the parties to such an arrangement, the enlargement is valid. It may also be made verbally by consent of the parties, and such consent may be implied from their conduct after the date fixed for giving the award, *e.g.* if they go on with the proceedings, and attend meetings before the arbitrator in connection with the matter, or if they make no objection to the authority of the arbitrator, they cannot afterwards object to his decision on the ground that the award was given after the time fixed for it. (*Hallett v. Hallett*, 7 Dowl., 389.)

The enlargement may also be made by order of the Court or Judge, and the Act 3 & 4 Wm. IV., c. 42, s. 39, provides "That in any reference to arbitration where the arbitrator or umpire has been appointed by any Judge's order, or rule of Court, or order of *nisi prius*, or by, or in pursuance of, any submission to reference containing an agreement that such submission shall be made a rule of Court, the Court, or any Judge thereof, may from time to time enlarge the term for any such arbitrator making his award," but although the Court or Judge can exercise a general power of enlargement at their discretion, a limit in the submission fixing the time when the award is to

be given, does not bind them as it would do an arbitrator, and the Court can enlarge the submission after the time fixed has expired. The term may also be enlarged under the C.L.P., Act 1854. 17 & 18 Vict., c. 125, s. 15, which gives power for the superior Court, of which such submission is, or may be made a rule or order, or for any Judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award, and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed an enlargement for one month.

The terms of the submission must be literally followed both as to the time fixed and the enlargement (if any) which may be necessary, and such enlargement may be endorsed on the submission.

Courts are not bound by time fixed for giving award.

Power of Court to enlarge the time.

If no period stated, enlargement for one month.

Terms of submission to be literally followed.

REVOCATION OF SUBMISSION.

A submission by consent of the parties may be revoked in various ways at any time before the award is given. It may be revoked by consent of the parties to it, but that can only be done in cases where the submission has not been made a rule of Court; Judge's order; or order of *nisi prius* in an action; in all which cases it can only be revoked by the Court or Judge on good cause shown. If the submission contain an express agreement by the parties to it to make it a rule of Court, it cannot be revoked by any of the parties without such authority as aforesaid. 3 & 4 W. IV., c. 42; s. 39 provides "That the power and authority of any arbitrator or

Submission may be revoked by consent.

If made order of Court, not revoked without leave of Judge.

Submission by
order of Court
not revocable
by parties
without con-
sent.

umpire appointed by, or in pursuance of, any rule of Court, Judge's order, or order of *nisi prius* in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of His Majesty's Courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge, and the arbitrator or umpire shall, and may, and is hereby required to proceed, notwithstanding any such revocation, and to make such award although the party making such revocation shall not afterwards attend the reference." It will be seen from this section that the Court is a reflex of the profession at large, and having got an advantage is not disposed lightly to part with it, but still it is manifestly to the interests of justice to prevent one of the parties to a submission being put to the inconvenience and loss attending an uncalled for revocation by the other.

In a partnership dispute it appeared there was a clause in the articles to refer all disputes to an arbitrator to be agreed upon by the parties, but in the said articles there was no clause that the submission should be made a rule of Court. The defendant moved that all proceedings in the action might be stayed, and all questions in the action might be referred to arbitration under sections 57 and 59 of the Judicature Acts, and Section 11 of C. L. P. Act, 1854.

Before the motion was heard the plaintiff revoked the submission to arbitration; it was held that although a particular submission to arbitration, (*i.e.* a submission made to some particular arbitrator), might be revoked, a general agreement to refer to arbitration could not be revoked by one of the parties. (*Piercy v. Young*, 14 Ch. Div., 203.) In order to make a revocation valid, notice of the intention of the party or parties making it must be given to the arbitrator, or he will not be affected by it. If one of the parties to the submission dies, it is a revocation of the arbitrator's authority, and under those circumstances no formal notice would be required; and if the submission is verbal, the revocation may, in like manner, be made. The marriage of a *feme sole*, after the proceedings have commenced before the arbitrator, is also a revocation of his authority, but in case of loss or damage to the opposite side by such marriage, an action for damages would lie. The bankruptcy of one of the parties to submission does not necessarily act as a revocation, although taking into consideration the futility of proceeding in a case of that kind, and also the small chance there would be of benefiting by the award of the arbitrator, if given against the bankrupt, it seems likely that the bankruptcy would enable the other party to the submission to revoke, if he were so disposed. Any misconduct on the part of the arbitrator of such a character as would affect the rights of the parties, would also be grounds for a revocation: manifestly if he takes a bribe from one of the parties, or receives hospitality, when such hospitality is given and ac-

Particular submission may be revoked, not a general submission.

Notice of revocation must be given to arbitrator.

Marriage of a *feme sole* revocation.

Bankruptcy of one of the parties not revocation.

Misconduct of arbitrator.

If he takes bribe.

cepted with the object and result of biasing the mind of the arbitrator, but not otherwise. (*Moseley v. Simpson*, 16 Eq., 226.) If the arbitrator privately takes the evidence of a witness without the knowledge of one of the parties to the submission—that being a course of procedure that could only have the effect of causing the arbitrator to err in his judgment—and so acts unfairly to one of the parties to the dispute, it would be grounds for a revocation of his authority.

Or acts unfairly.

The death of an arbitrator was originally a revocation of the submission, but now it is provided by the C. L. P. Act, 1854, ss. 12 and 13, that the judge may appoint a new arbitrator (in default of the parties doing so) in case of the death, incapacity, or refusal of an arbitrator to act: and in case of the appointment of two arbitrators, and one dies, refuses to act, or becomes incapable of doing so, the survivor can act alone.

Death of arbitrator.

The L. C. C. Acts, 8 & 9 Vict., c. 18, Companies clauses Consolidation Acts, 8 & 9 Vict., c. 16, the Railway Co.'s Clauses Act, 8 & 9 Vict., c. 20, and the Railway Co.'s Arbitration Act, 22 & 23 Vict., c. 59, all contain clauses providing for the appointment of arbitrator in place of the one who dies, or refuses to act, or becomes incapable of acting.

New arbitrator can be appointed by the Judge under C. L. P. Act, 54.

It has been said previously, that the death of one of the parties to arbitration would revoke the submission and put a stop to all the proceedings in the matter. This result would not occur if a clause were inserted in the submission expressly providing that in case of the death of one of the parties, the proceedings should not be stopped, and if there are several parties on either side, death does not appear to act as

Death of one of the parties not in all cases a revocation.

a revocation ; but the award only binds the survivors to the agreement, and has no effect upon the personal representatives of the deceased.

Where the revocation is by consent of the parties, it must be effected by an instrument of as high a character as the submission itself, and if the latter is by deed, the revocation must be by deed also.

If submission is by deed, revocation to be by deed also.

Having thus far endeavoured to show what is a submission to arbitration, what matters may be included in it, how it may be made, altered, enlarged and revoked ; we will next proceed to consider the arbitrator, his duties and responsibilities before giving the award, and the principles that ought to guide him during the time he holds that position.

As to arbitrator.

CHAPTER IV.

DUTIES AND POWERS OF AN ARBITRATOR.

As the questions brought before an arbitrator are frequently of very considerable importance, and such as require a special knowledge for their due consideration and eventual settlement, it is of the highest importance that a suitable person should be chosen for so responsible a post. The legislature acknowledging this principle has acted upon it by providing in the Judicature Acts for the appointment of special as well as official referees, so that all cases requiring special knowledge or skill may have men of experience to decide them. It has also, in its desire to do justice,

empowered the Courts to call in the services of properly-qualified men as assessors to sit on the Bench during the trial of any action in which their special knowledge may be of assistance to the Court. The "High Court of Parliament" having thus provided that cases requiring judicial settlement shall have every advantage that can be obtained by special knowledge, it is not too much to expect that parties to a reference, who have agreed to refer their disputes to arbitration, should exercise equal care in providing for the proper settlement of their affairs, and for that purpose should choose a suitable person to act as arbitrator between them. The necessity for these remarks will be seen when we answer the question, Who may be an arbitrator? for we find that, except in those cases where specially-qualified persons are by statute to be selected for the post, any person may be appointed to the office, "for an arbitrator, being a judge elected by the party, every one capable of making an arbitrament may be an arbitrator" (*Comyns' Digest, Arb., B.*); but Comyns there disqualifies idiots, lunatics, infants, and married women, but if any party to a submission should choose any of the class mentioned, with a full knowledge of the circumstances, and agree to abide by their decision, it appears that such a decision would be binding, and could not afterwards be called in question, neither could the party making such choice refuse to obey the award, or object to the want of capacity in the person chosen by himself, as he would have nobody but himself to blame in the matter. An arbitrator should be a man who is not personally concerned in

Who may be arbitrator.

Any person may be appointed,

Idiots, lunatics, infants, married women.

Qualities of arbitrator.

the dispute, and who is in a totally independent position so far as either of the parties to the arbitration is concerned, and who is not labouring under any mental or other incapacity. He should have no interest in the question brought before him, as that would render him incompetent to perform the office; but if, having an interest in the dispute, he makes no secret of it, and the fact of such interest existing is known at the time to both the parties, and they, notwithstanding, proceed with the reference, the award is good. But the Court will restrain an arbitrator from proceeding in a matter if it has reason to think he is not a fit person to undertake the duties of arbitrator, and that it is not probable, owing to the circumstances, that he will faithfully perform and honestly discharge his duty. (*Beddow v. Beddow*, 9 Ch. Div., 89).

Should have no interest.

If having interest, it is known to both parties, award good.

Court will restrain arbitrator if he is not a fit person.

The disqualifying interest must, however, be of such a nature as to bias or influence the mind of the arbitrator, and the fact of his owing a sum of money, or being simply a creditor to one of the parties to the arbitration, is not, it appears, sufficient personal interest to make void his award. Where an arbitrator had advanced a considerable amount of money to the defendant before his appointment, and it was objected that that fact gave him such an interest in the case as would prejudice his award, the Master of the Rolls held that it was not sufficient interest to call for his interference. (*Malmesbury Railway Co. v. Budd*, 2 Ch. Div., 113).

Interest must not be of a nature to influence.

Money owing by one of parties to arbitrator not a disqualification

But stewards of a race-course, although they may have an interest in the race by reason of one of their

Stewards of race-course as arbitrators

in disputed
race.

body having made a bet on the result, are not thereby incapacitated from being arbitrators in a disputed race. (*Ellis v. Hopper*, 28 L. J. Ex., 1).

Acceptance of
office.

The acceptance of the office by the arbitrator is necessary before the appointment is valid.

We see, therefore, that the first requisite of an arbitrator is that he shall not have any personal interest or feeling in the matter in dispute of such a nature as shall be likely to destroy that strict impartiality necessary for the proper performance of his duties; and that he should be above suspicion; as if there is evidence of either partiality, bias, corruption, or fraud, the Courts will set aside his award. And if it is necessary for the arbitrator to be disinterested at the commencement of the proceedings, it is equally important for him to keep so during the progress of the arbitration, and that during the time of his authority he do no act likely to bias his judgment or influence his award. He should not accept hospitality from one of the parties to the dispute, for, as we have shown, where such hospitality was given to, and accepted by, the arbitrator during the reference, his award was held void. (*Moseley v. Simpson*, L. R., 16 Equity, 226).

Not to receive
hospitality
from either
party.

Arbitrator's
authority
commences
with actual
proceedings.

The arbitrator's authority only commences with the actual commencement of the duties of his office and does not date from his appointment to the post. (*Baker v. Stephens*, 2 Q. B., 523.) Section 12 of the C. L. P. Act, 1854, provides that, "if in any case of arbitration where the document authorising the reference provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of

an arbitrator, or, if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one, a Judge of any of the superior courts of law or equity, may, upon summons, appoint an arbitrator who shall have like powers to act in the reference, and make the award as if he had been appointed by consent of all parties ; " that section of course only applies where the submission has been made a rule of Court, as unless that has been done, the Courts, as we have seen, have no jurisdiction. Section 15 of the same act, provides for cases where there is no mention in the submission as to the date on or before which the award is to be given. " The arbitrator acting under any such document, (*i.e.* rule of Court, or Judge's order), or compulsory order of reference, or under any order referring the award back, shall make his award under his hand, (unless such document or order respectively, shall contain a different limit of time), within three months after he has been appointed and shall have entered on the reference, or shall have been called upon to act by a notice in writing, from any party, but the parties may, by consent in writing, enlarge the term for making the award." The arbitrator being appointed, and having received notice of, and having accepted his appointment, must consider himself a Judge, and give his attention to the case, call his witnesses, take their evidence, and act in the matter as though he were both Judge and Jury. Like a Judge, he will be bound

Court may
appoint arbi-
trator if
parties
neglect.

Where no date
is fixed, award
to be made
in three
months.

Arbitrator,
after appoint-
ment, has
powers of
Judge.

Cannot give
an illegal
award.

Mistake in
law not fatal
to award.

Authority
ends with
award.

Has to fix
time and
place of
meeting.

by the law, and cannot give his decision regardless of it, any more than a Judge can, for the law being made, has to be administrated, so that the arbitrator cannot in his award direct an act contrary to the law to be performed, if he did so his award would, without doubt, be set aside; but a mistake by the arbitrator as to the legal effect of his finding, is no ground for nullifying his award (*Greenwood v. Brownhill*, 44 L. J., 47 C. A.); neither will a mistake in the law itself set aside the award. After the arbitrator has given his award his duty ceases and cannot be resumed, neither can he exercise any official act in connection with the matter. For good or evil, his award has been made and cannot be altered, neither can he correct any mistake in it, even within the time fixed for the award except by consent of the parties, although it may be a patent mistake, and can be shown to have occurred in the copying of it from the original draft. The award having made in proper form, the power and duty of the arbitrator is dead, and there is no process by which it can be revived. After his appointment, the arbitrator is armed with considerable judicial power, and has the same authority as a Judge, (in some cases more), as to the conduct of the case before him, but although his powers are great, his use of them is subject to the revision of the Court. It is his duty to fix the time and place of meeting, regard being had to the convenience of the parties to the reference. If, as sometimes happens, the parties have not been able to get up their evidence, a day should be fixed that would give them sufficient time for that purpose, and the

arbitrator would do well to have the facts of the case fixed in his mind before the *commencement* of the official proceedings. The time and place being fixed upon, the parties to the reference should attend before the arbitrator with their witnesses and the evidence necessary to support their case.

Should have a previous knowledge of the facts.

Parties to attend before arbitrator with their witnesses.

Witnesses to have notice.

The witnesses must be served with a notice that their attendance will be required at the time and place fixed upon, and such notice must be signed by the arbitrator. The Act 3 & 4 Wm. IV., c. 42, s. 40 provides "That where the submission is by rule of Court, Judge's order, or at *Nisi Prius* in an action, or by an agreement containing a consent to such submission being made a rule of Court," it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge by rule or order to be made for that purpose to command the attendance and examination of any person to be named in such rule or order, and the disobedience to any such rule or order shall be deemed a contempt of Court if in addition to the service of such rule or order an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators or the umpire before whom such attendance is required, shall also be served either together, with, or after the service of such rule or order, provided always that every person whose attendance shall be so required, shall be entitled to the like conduct money and payment of expenses, and for loss of time, as for and upon the attendance of any trial, provided also that the application made to such Court or Judge

Notice to be agreed by arbitration.

Courts can command attendance and examination of witnesses.

Witnesses to be paid for attendance.

for such rule or order, shall set forth the county where the witness is residing at the time, or satisfy such Court or Judge that such witness cannot be found. But the witnesses shall not be compelled to attend at more than two consecutive days to be named in such order." Before the C. L. P. Act the Court of Chancery had no power to compel the attendance of witnesses, but now it appears that since the Judicature Acts, the Chancery Division of the High Court may, under this section, by order made on summons, and served as any ordinary subpœna, compel the attendance of witnesses. (*Charborough v. Toothill, L. R., Ch. Div., 787.*) Where there are (as is sometimes the case) several joint arbitrators appointed to represent different interests in the reference, they should all attend in person at the various meetings held in connection with the matter, and there should be no evidence taken unless in their joint presence. They must each personally hear the evidence, and form an opinion for themselves as to its value, as the arbitrator has no power to delegate his authority even to his co-arbitrators, and in case he does so, his award will be set aside (*Dobson v. Groves, 6 Q. B., 637*). Joint arbitrators should also, in order to give validity to their award, consult together after the case is closed and all the evidence has been taken, in order to arrive at a fair and reasonable judgment from the facts before them, and they should each sign the award when they have agreed upon it; as they cannot, in giving the award, delegate their authority, any more than they can in taking evidence of the facts. If they do so, the award will be set aside. An arbi-

Where joint arbitrators, they should all be present at each meeting.

trator is bound to receive and hear the evidence brought before him, so far as that evidence refers to the question which he is called upon to decide, in the same manner as a Judge would be in a like case before him in Court; and he must hear the witnesses produced on both sides, for, if without good cause shown, he wilfully refuses to hear one side, his award will be bad and set aside accordingly. This is very clearly laid down by Lord Eldon in the case of *Sharpe v. Bickerdyke*, 3 Dowl., 102, which case has since been under the review of the Courts upon many occasions, and the decision has generally been upheld, and is now considered unassailable.

Must hear
both sides.

The arbitrator must also give both parties a reasonable opportunity of bringing all their evidence before him; and in case one of the parties by his conduct cause a delay in the proceedings, he cannot on that account proceed with his award, as each party has a right to bring his evidence before the arbitrator, and must have reasonable allowance as to time for that purpose; neither can an arbitrator give his award without due notice to the parties concerned, *i.e.* after having given one of the parties reason to believe that he will give him an extension of time in which to bring forward some other evidence, he cannot give his award without giving him an opportunity to do so. (*Haigh v. Haigh*, 1 De G. F. & J.) If one party, after due notice being given and opportunity afforded, will not appear at the time and place fixed upon, the arbitrator may, in his absence, proceed with the reference unless the absent party can give a reasonable and satisfactory excuse for his ab-

Must not act
hastily.

Must give due
notice to both
parties
when award
is ready.

Arbitrator
can proceed
in absence of
one of the
parties after
notice.

Should not go
beyond the
submission.

Arbitrator
must be
present.

Arbitrator
can refuse
evidence.

Is judge of
competency
of witnesses.

sence. (*Gladwin and Chilcote*, 9 Dowl., 550.) An arbitrator should confine his enquiries to the matters referred to him by the submission, and should decline to take evidence on any questions not coming within the scope of the reference, and he should only take such evidence in the presence of the parties themselves, or of some one (as a solicitor) attending on their behalf, he should also, himself, be present in person. If he allows evidence to be taken in any other way, the Court, on application, will set aside the award. (*Dobson v. Groves*, 6 Q. B., 637.) It is not usual to exclude the parties themselves, but he may exclude all the other witnesses whilst one witness is giving his evidence. He should receive all the evidence brought before him when properly tendered by either party, and should carefully examine all the witnesses; and, since the Act 14 & 15 Vict., c. 99, both the plaintiff and the defendant are competent witnesses. Where the arbitrator refuses to examine witnesses or to receive evidence, the Court will, it seems, sometimes set aside the award (*Phipps v. Ingram*, 3 Dowl., 669), but if the arbitrator is a man of special knowledge and skill, and has been appointed by the parties to the reference on those grounds and in order that they may have the benefit of those qualities, and he in the course of the reference refuses to call witnesses or receive evidence on the special subject before him, the Court will not set aside his award on that account. (*Johnson v. Cheape*, 5 Dowl., 247).

The arbitrator is a judge as to the competency of the witnesses to give their evidence, as well as of the

admissibility of that evidence when given. He is not, however, a judge as to whether the evidence is material, and should, therefore, receive all the evidence properly tendered to him; as rejecting any such evidence is a matter of great responsibility, even though he may consider it of no importance to the case (*Johnson v. Cheape*, 5 Dowl., 247): although rejecting any evidence under a mistake as to its value is no ground for setting aside the award. (*Perriman v. Steggall*, 9 Bing., 679.) Where an arbitrator after closing the examination, refused, on the application of one of the parties, to call another meeting, although such party was in possession of fresh evidence repelling that given during the course of the proceedings and on which the award was founded, the Court refused to interfere. Every arbitrator having authority to hear, receive, and examine evidence, is empowered to administer an oath to all such witnesses as are legally called before him; the Act empowering him to do this is 14 & 15 Vict., c. 99, s. 16, which provides—"every Court, judge, officer, commissioner, arbitrator, or other person now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such parties as are legally called before them respectively." All parties attending a reference, including witnesses, &c., are privileged from arrest during the period of their attendance at the reference, including the time occupied in their going to the place of meeting and returning home (*Randall v. Gurney*, 3 B. & A., 252); and even also in cases where the parties go of their

Not as to
materiality of
evidence.

Arbitrator
empowered to
administer
oath.

14 & 15 Vict.,
c. 99, s. 16.

Parties
attending a
reference
secure from
arrest.

Arbitrators
should take
all necessary
notes, &c.

Should follow
the procedure
at a trial.

Should not
receive
private evi-
dence from
one party.

All parties
should be
present when
evidence is
received.

Injured party
should revoke
submission.

If he does
not, he
waives his
right to
object.

Arbitrator
can call for
the produc-

own free will, *i.e.*, when their attendance might have been compelled in the first instance (*Spense v. Stuart*, 3 *East*, 89). The arbitrator should take every means at his disposal to arrive at a just conclusion, and in furtherance of that object should take such notes of the evidence tendered as will be necessary to enable him clearly to understand the facts, and to bear them and the evidence in mind, and he should, as far as possible, follow the course of procedure acted on by the Judge at a trial, as he may be quite sure that he will not go very far wrong with high judicial authority to support him. An arbitrator should not accept any private information bearing upon the question before him, or if he does receive such, he should, at the earliest opportunity, communicate it to the opposite party. (*Harvey v. Shelton*, 7 *Bea.*, 462.) However, it is far more in accordance with the position he occupies, and with the judicial impartiality of his office, to accept no evidence from either side, or from any of the parties to the reference, except in the presence and with the full knowledge of them all. If it comes to the knowledge of one of the parties that the arbitrator has taken an undue advantage, or acted in such a manner as would prejudice his interest in the award, he should at once revoke the submission; as, after any improper conduct on the part of the arbitrator has come to the knowledge of the injured party, if he still allow the proceedings to continue he waives his right to object. (*Drew v. Drew*, 25 *L. T.*, 282.) The arbitrator should be able to call for all the necessary books and documents relating in any way to the question before him;

and in order that he may do so, there should be a clause inserted in the submission giving him power to demand their production when required. An official or special referee has no power to call for the production of documents in a matter before him, and if he requires them he must take out a summons in the chambers of the judge to whom the action is attached. The various statutes, *viz.*, the Land Clauses Consolidation Acts of 1845, the Railway Clauses Consolidation Acts, 1845, and the Railway Companies' Arbitration Acts, 1845, all provide for the arbitrator taking evidence on oath, and also empowering him to call for the production of documents in all matters of dispute arising under them. The arbitrator should not, as we have seen, close the hearing until he has heard all the witnesses on both sides, as the Court will set aside the award if there is evidence that the arbitrator did not give reasonable opportunities to the parties to complete their case, although there may have been unnecessary delay in the matter by one of them. (*Doddington v. Hudson*, 1 *Bing.*, 384; *Solomon v. Solomon*, 28 *L. J., Ex.*, 129.) Although the arbitrator is the judge as to the admissibility of evidence, he is not thereby empowered to exercise an irresponsible discretion in the matter of receiving or refusing such evidence, but is bound by the same rules in that matter as a Court of Law (*Attorney-General v. Davison*, 1 *M'Cl.* & *Y.*, 160); but, if owing to a mistaken idea, yet desiring to act justly, he reject the evidence he ought to receive, or, on the other hand receive the evidence of an incompetent witness, the Court will not, on those grounds alone, set aside the award.

tion of documents.

Official or special referee cannot call for the production of documents.

Arbitrator should allow time for parties to conclude their case.

Is bound by same rules of evidence as Courts of Law.

But mistake will not invalidate award.

Can get
opinion of
Court as to
admissibility
of evidence.

Rejection of
new evidence
after closing
accounts.

If one of the
parties refuse
to go on, the
arbitrator can
proceed *ex*
parte.

Arbitrator to
give notice to
party
refusing.

set aside the award. (*Hagger v. Baker*, 14 M. & W., 9.) It is better, however, to be too lenient in receiving than too strict in refusing to accept the evidence tendered; and if a question of doubt as to the admissibility arise in the arbitrator's mind, and he desire the opinion of the Court upon it, he can, it seems, obtain it by stating the points in a certificate giving all the necessary facts for such opinion. (*Attorney-General v. Davison*, *supra*.) In a case where an accountant was employed by the arbitrators to go into a matter of accounts, and did so, and after making his report he was instructed to close the accounts. After the accounts were closed, one of the parties to the arbitration found other documents in connection with the closed accounts, and tendered them in evidence to the arbitrators at the last meeting held by them in connection with the matter. The arbitrators, after an inspection, declined to admit them in evidence on the ground of the delay that would be caused by thoroughly going into them. The Court held that it was merely a rejection of evidence by the arbitrator, and was not of such a character as to make void the award. (*In re Marsh*, 16 L. J., Q. B., 330; *Russell on Arbitration*, 6th Edit., p. 208.)

If one of the parties to the arbitration, without good cause shown, refuses to go on with the reference, or to bring forward his evidence, or declines to attend the proceedings with the intention of thereby defeating the reference, the arbitrator can proceed *ex parte*, and give his award in his absence. It is usual in such cases for the arbitrator to give notice, either verbally or in writing, to the absenting party of his

intention so to proceed, and the notice should be in precise language, or the award may be set aside. (*Gladcorn v. Chilcote*, 9 Dowl., 550.)

Parties should be informed when case is closed.

When the arbitrator has taken all the evidence tendered by the parties to the reference, and has satisfied himself that nothing material to the case has been kept back, it is his duty to inform the parties that he considers that the case is closed on both sides, and that he will now proceed to make his award. But it is in his power, if he thinks fit, to receive further evidence, or if the evidence he has received may with advantage be supplemented, he can call for fresh evidence. (*Bignall v. Gale*, 2 M. & G., 830.)

After case closed, fresh evidence can be received.

CHAPTER V.

JOINT ARBITRATORS AND THE UMPIRE.

MATTERS in dispute, as we have mentioned, are frequently referred to two or more arbitrators, and although that course of procedure is not generally to be commended, still, as it exists, it has to be dealt with. Where two or more arbitrators are appointed, the submission should provide for the appointment of an umpire in case of the disagreement of the arbitrators, or when they do not give their decision within the time specified in the submission for that purpose. In some cases the umpire is named in the submission; in others, the arbitrators are em-

Joint arbitration.

Where two or more arbitrators are appointed. Appointment of umpire.

Arbitrators
should choose
umpire.

powered to choose an umpire, the latter is the better course to pursue. The arbitrators can (unless limited as to time by the submission) appoint an umpire any time, either before or after the time fixed for them to make their award, provided it be before the time limited for the umpire to make his umpirage. (*Harding v. Nutts*, 15 *East*, 556; *Archbold*, Vol. 2, p. 332, 14th Edit.) The C. L. P. Act, s. 14, provides that "When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice, as aforesaid, to make the appointment sooner."

Appointment
of umpire
to be made
by both arbi-
trators in
writing,
signed in
presence of
each other.

The umpire should be appointed by all the arbitrators, and the appointment must be in writing, signed by them all in presence of each other. The umpire must not be appointed by chance, or the Court will set aside the award (*in re Cassell*, 9 B. & C., 624), and in a case where the arbitrators could not agree upon a suitable person and they agree to cast lots as to who should have the appointment, the Court held the appointment bad. (*Wells v. Cooke*, 2 B. & A., 218; but see in *re Hopper's Arbitration*, 2 Q. B., 367.)

Appointment
must not be
by chance.

Where arbi-
trators have
neglected to
appoint
umpire,
Judge can
appoint.

In a case where a dispute arose between a shareholder and a company as to the price to be paid for his shares, and the arbitrators had neglected to appoint an umpire, it was held that the case was within the above section, and the Judge could appoint

an umpire. (*Liquidators of Anglo-Italian Bank and François de Roza*, 2 Q. B., 452.)

Section 27 of the L. C. C. Acts, 1845, provides :
 “That where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act; and if such umpire shall die or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final.” Section 12 of the Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, refers to the case of only one arbitrator and then proceeds, “or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties, or arbitrators, do not appoint an umpire or third arbitrator, or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then, in every such instance, any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator, respectively; and if within seven clear days after such notice shall have been served, no arbitrator,

Procedure
under C. L. P.
Act, 17 & 18
Vict., c. 125.

Where one
arbitrator or
the umpire
dies, &c.,
Judge may
appoint
another if
parties do not.

umpire, or third arbitrator be appointed, it shall be lawful for any Judge of any of the superior Courts of Law or Equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, or third arbitrator, respectively, shall have the like power to act in the reference and make an award, as if he had been appointed by consent of all parties." Arbitrators cannot delegate their authority to another—even in cases where two or more are chosen—so that each arbitrator appointed by the parties should be present at every meeting; sift the evidence for himself, and sign the award. (*Plews v. Middleton*, 6 Q. B., 845; *Wade v. Dowling*, 4 E. & B., 44; *Eads v. Williams*, 24 L. J., Ch., 531.) If two arbitrators are appointed, and by the submission are authorized to choose a third to act with them, they should do so before taking any steps in the reference; and if two are empowered to act alone, and give a valid award, they can, in the absence of the third party, proceed with the reference; but there must have been a notice given to the third arbitrator of the time and place of meeting, and he must have refused to attend or take any part in the proceedings. (*Goodman v. Sayers*, 2 J. & M., 242; *White v. Sharp*, 12 M. & W., 712.) After the umpire is appointed and is called upon to act, he should examine the witnesses himself, but may, by consent of the parties, receive evidence from the arbitrators, and is bound by the same rule of conduct as the arbitrators are, and if he refuse to hear and examine a witness after

Each arbitrator must act.

Where two are chosen, with power to appoint a third.

Umpire should examine witnesses *de novo*.

having been asked to do so, his umpirage will be set aside (*Salkeld v. Slater*, 12 *A. & E.*, 767): and if he refuse to hear further evidence in addition to that given before the arbitrators, his umpirage is void. (*In re Jenkins v. Wife*, 1 *Dowl., N. S.*, 276) The umpire must give his judgment within the time fixed by the deed appointing him to the post, and it depends upon the terms of the submission as to whether he can enlarge the time for making his umpirage. (*Re Sumford*, 6 *M. & Sel.*, 226.) There is no stamp required on a document appointing an umpire, unless the appointment be by deed. (*Routledge v. Thornton*, 4 *Taunt.*, 704.) If an umpire is appointed, and no specified time is fixed for him to commence his duties, he has no authority to act until the arbitrators disagree. (*Comyns' Digest, Arb., F.*) If the arbitrators join with an umpire in his deed of umpirage, it will not invalidate the award, but being unnecessary it will have no effect whatever. (*Beck v. Sargent*, 4 *Taunt.*, 232.) Unless otherwise specially provided the appointment of umpire may be verbal. (*Oliver v. Collings*, 11 *East*, 367.) If the arbitrators agree upon some points and disagree upon others, and they finally appeal to the umpire, the duty of the latter is to take the whole of the case into consideration, and not simply those points on which the arbitrators have disagreed, unless it is provided in the submission; and where the umpire makes his umpirage on the disagreement of the arbitrators, or from their failing to make an award, he is entitled to charge, as costs, the fees due to the arbitrators as part of the cost of the reference.

Refusal to hear further evidence renders umpirage void.

Umpire enlarging time.

No stamp required on document appointing umpire, unless appointment is by deed.

Umpire's authority commences from disagreement of arbitrators.

Unless specially provided, appointment may be verbal.

Umpire must consider the whole case.

Costs of umpire.

(*Ellison v. Ackroyd*, 20 L. J., Q. B., 193; *Russell on Arbitration*, 6th Edit., 249.)

CHAPTER VI.

THE AWARD.—REQUISITES OF AN AWARD.

THE case before the arbitrator having been thus far concluded; the witnesses on both sides having been heard and the evidence tendered by them having been received and duly sifted; nothing now remains but for the arbitrator to make his award, and, in so doing, the first consideration for him to bear in mind is that it must be made within the time fixed in the submission. If he is limited to a certain day, say the 30th March, such day is included, and if the time has been enlarged, the award must be given within the enlarged time (*re Higham*, 9 Dowl., 203); but the arbitrator has no power to limit the time fixed in the submission for making his award (*Re Morphett* 2, D. & L., 967): neither can he make an award after his power has been revoked by either of the parties which, as we have seen, can now only be done by leave of the Court or a Judge, 3 & 4 Wm. IV., c. 42, s. 39. When the submission limits the time for giving the award to months, the Courts, following their usual practice, will consider such months to be lunar, and not calendar months. (*In re Swinford*, 6 M. & S., 226.) There is no precise form of words necessary for making the award; it has only to show that the

Arbitrator
has no power
to shorten the
time.

Months mean
lunar months.

No form of
words neces-
sary for
award.

arbitrator has finally and fully made up his mind as to its purport. It should follow the submission in every particular, and not include anything foreign to the questions to be decided, but should follow in all things the formalities required by the submission, otherwise it will be void; and where the submission is silent as to the form of the award, the arbitrator is at liberty to make use of such formalities as he chooses.

(*Everard v. Paterson*, 6 Taunt., 625; *Hanson v.*

Liversedge, 2 Vent., 242.) It is not necessary to

recite in the award that an enlargement has been

made, although such a course may be pursued with

advantage in accordance with the principle of pre-

cision that ought always to characterise the arbitrator's

actions; so if the submission require a view of certain

premises, and the view has been made, it is as well to

recite the fact. (*George v. Lousley*, 8 East, 13;

Davies v. Pratt, 17 C. B., 183). Although recitals

are not necessary they are not unimportant, as they

frequently tend to make clear what would be other-

wise uncertain in the award. A plan may be

annexed to and incorporated with the award, and in

Johnson v. Latham, 20 L. J., Q. B., 236, it was held

that words of explanation on a map were to be taken

as a part of the award. The award should be in

writing, for, by section 15, of the Common Law Pro-

cedure Act, c. 125, it is enacted that an arbitrator

acting under any such document or compulsory

reference as aforesaid, or under any order referring

the award back shall make his award under his hand;

and a parol award since the Act would only be valid

where the submission was verbal. As the folly of

Recitals in
award not
necessary.

Plans and
writings in-
corporated by
reference.

Award should be signed by all joint arbitrators, in presence of each other.

Should be properly stamped.

verbal submissions has been shown it will only be necessary to repeat that the award should be in writing, and should also be signed by the arbitrator, or arbitrators as the case may be, bearing in mind that where there are joint arbitrators the award should be signed by all in the presence of each other, and a witness should attest the signatures. The award should also be made on paper, engrossed and properly stamped with an award stamp. The duty imposed on awards is regulated by the Acts 33 & 34 Vict., c. 97.

When the amount or value of the matter in dispute does not exceed

Stamp duties on awards.

£5	£0 0 3
Exceeds 5 and does not exceed	£10 0 0 6
„ 10 „ „	20 0 1 0
„ 20 „ „	30 0 1 6
„ 30 „ „	40 0 2 0
„ 40 „ „	50 0 2 6
„ 50 „ „	100 0 5 0
„ 100 „ „	200 0 10 0
„ 200 „ „	500 0 15 0
„ 500 „ „	750 1 0 0
„ 750 „ „	1000 1 5 0

and where it exceeds £1000, and in any other case not above provided for, £1 15s. 0d.

It is usual to give an award, stamped in accordance with the above scale, to the party in whose favour it is made, and a copy of it, unstamped, to the other. An unstamped award cannot be given in evidence nor enforced by an application to the Court. (*Hill v. Slocombe*, 9 Dowl., 339.)

A non-professional arbitrator may obtain the assistance of counsel in framing the award, but he should not choose for that purpose a professional man who has acted as legal adviser for one of the parties to the reference. (*Fetherstone v. Cooper*, 9 Ves., 67; *Underwood v. Bedford and Camb. Railway Co.*, 11; *C. B., N. S.*, 442.)

Arbitrator may take legal advice as to framing award, but not where legal arbitrator was objected to.

A lay arbitrator will generally be allowed to have a legal adviser to sit with him during the proceedings, in order to give him the necessary assistance and advice, but where an objection had been made by one of the parties to a legal arbitrator, and a lay arbitrator was appointed, the latter was not entitled to have a lawyer to sit with him. (*Proctor v. Williams*, 29 L. J., C. P., 157.) When it is provided by the submission that the award "shall be made and published ready to be delivered to the parties" at their request, on a certain day, it is considered published when it is executed with the necessary formalities required by the submission. (*Henfree v. Bromley*, 6 East, 309.) Notice of such execution should be given to the parties; as in case of setting aside the award, time only begins to run from such notice. (*Brooke v. Mitchell*, 6 M. & W., 473.) When the arbitrator has published his award, he is then "functus officio," and cannot afterwards remedy any mistake made, or rectify any blunder: e.g., where he has made a mistake in his figures, or put down the wrong name in the direction to pay costs. (*Mordue v. Palmer*, L.R., 6 Ch., 22; *Irvine v. Elton*, 8 East, 54; *Ward v. Dean*, 3 B. & Ad., 234.) If after the time fixed for giving his award, he alters it, the original award will

Award is published when executed.

When award is published, arbitrator's authority is at an end.

Arbitrator cannot alter award after publication.

stand, and the alteration will have no effect whatever. (*Henfree v. Bromley*, 6 East, 309). In case of a mistake being made by the arbitrator, Sect. 8 of the C.L.P. Act, 17 & 18 Vict., c. 125, provides that "the Court or a Judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator." Either of the parties may obtain the award from the arbitrator after he has received notice of its execution, on payment of his charges, and the arbitrator is justified in withholding the award until such charges are paid.

AWARD MUST BE FINAL.

Award must be final, and not include subsequent causes of dispute.

The arbitrator must make his award a final decision of the questions submitted to him, but must only decide the actual questions and matters referred to him for determination. He cannot award payment of a debt which has become due after the parties have commenced the arbitration, or the payment of rent not due at the time the award was given. (*Bunfill v. Leigh*, 7 Dowl., 175; *Barnardiston v. Fowler*, 10 Mod., 204.)

Arbitrator can only make one award.

Award must be entire and complete on day appointed.

As an arbitrator can only make one award (unless by the submission he is authorised to make more), such award must be one entire instrument and complete in itself, and made at one time. It cannot be made at different times, or part one day and part another; even though each separate part is made before the time fixed for the award to be given. (*Comyns' Digest, Arb., E.*, 16.) But if there are

several arbitrators, they may meet and settle matters on different days, but their award upon the matters referred being "one and indivisible" must be entire. **Award must be entire.** Thus, where by an order of reference a cause and all matters in difference between A and B were referred, and, by a subsequent order made after the first reference had commenced, it was directed that C should be made a party thereto as if he had been an original party, and that a cause between A and C, and all matters in difference between A B and C, each and every of them jointly and severally should be referred to the same arbitrator, and the arbitrator made two awards, in one of which he awarded that A was indebted to B without mentioning C, and in the other that A was indebted to C without mentioning B; it was held that both awards were bad, and that the arbitrator had not performed his duty properly, as there was no one award determining all matters in difference between all the parties. (*Winter v. Munton*, 2 *Moore*, 723; *Russell on Arb.*, 6 *Edit.*, 266.) But where the arbitrator had power in cross actions between the parties to make an award or certificate, and he delivered two papers containing two certificates, it was held that, if made at the same time, the two certificates were but one award, containing the decision of each cause written separately, so as to be applicable to the separate cases. (*Smith v. Reece*, 6 *D. & L.*, 520.)

The arbitrator, however, can, if so empowered by the submission, make several awards (*Wrightson v. Bywater*, 3 *M. & W.*, 199), and each award will be final and binding upon the parties. **Arbitrator can, if authorized by submission, make separate award.**

Railway Companies' Arbitration Act, 1859.

Award bad where it only touches some of the matters referred.

Award must not be conditional.

The direction in the award must be express.

Award bad, if dependent upon the happening of certain event.

By the Railway Companies' Arbitration Act, 1859, 22 & 23 Vic., c. 59, s. 21, it is provided that arbitrators, in a reference under that Act, may make several awards, each on part of the matters referred. Where the award decides some only of the matters included in the submission, and leaves others untouched upon, it will be bad, as not being final. (*Hayward v. Philips*, 1 N. & P., 288.)

An award must not leave the result conditional upon some act to be performed by one of the parties at a future time, as that would not be final. (*Croft v. Harris*, *Carthew*, 187.) And an award directing that if A should surrender or give up his shares, he should receive a certain sum of money from B is bad. Lord Brougham in this case remarked that it is in vain to argue that this direction was the same as a direction to a party to do so-and-so upon another producing letters of administration, or that it is like the case of a party who is directed to do so-and-so upon a discharge being executed to him. (*Baillie v. Edinburgh Oil Gas Company*, 3 C. & F., 639.) The direction should have been that B shall pay a certain sum of money, and that A shall give up the shares. If the award contain a proviso that upon the happening of a certain event it shall be wholly void, it will be bad as not being final; as the happening of such future event might never take place (*Kinge v. Fines*, *Sid.*, 59); and when the award contained a proviso that if either party were dissatisfied with such award, and if within a certain specified time they paid a sum of money to each other, the award should be void, and the parties should be at liberty to recommence proceedings, it

was held bad *in toto*. (*Sherry v. Richardson*, *Pop.*, 15.)

But an alternative award is good, *e.g.*, an award that one party shall pay the other £100 by a certain day, and if such sum is not paid by that day then to pay £110 on a future day, is valid. (*Rolls, Ab. Arb., H.*, 8; *Comyns' Digest, Arb., E.*, 15.)

Alternative
award is good.

As we have said, an arbitrator cannot delegate his authority, or any part of it, to another, but must make a final and complete decision upon all the matters referred to him, and take part personally in the proceedings from the commencement. And an arbitrator cannot reserve to himself power to perform any judicial act in connection with the reference at a future time. And in a case where the award directed that so many trees should be left on certain lands for house bote and hedge bote, as the arbitrator, upon the advice of counsel, should appoint, it was held that the award was bad, as reserving to the arbitrator certain judicial functions to be performed in future after his authority had expired by the giving of his award, (*Thinne v. Rigby*, *Cro. Jac.*, 314.)

Arbitrator
cannot dele-
gate his
authority,

or reserve to
himself future
power to per-
form a
judicial act.

An award that the parties, or some of them, shall abide by the decision of a third person, whom they shall name, is void, on account of the delegation of the arbitrator's authority, whose duty it is to decide for himself. (*Johnson v. Latham*, 19 *L. J., Q. B.*, 329.) Also a partial delegation of authority makes void the award, as where an award directed that A should pay B £50, and should also, at such time and place as B should appoint, beg B's pardon, it was held void on account of the partial delegation of the arbitrator's authority, whose duty it was to fix both time

Award of
third person
is bad.

Cannot par-
tially dele-
gate.

and place for the performance of the award. (*Glover v. Barrie*, 1 *Salk.*, 71.)

Arbitrator cannot reserve nor except any matters for future litigation. Must decide all claims between parties.

An arbitrator can neither reserve nor except any matters in dispute for future litigation; as if he do so his award is not final: and where the arbitrators, in a reference of all matters in dispute between the parties, ordered one defendant to pay a certain sum to the complainant in full satisfaction of all claims against him as executor, or against his testator's estate, but directed that the other defendants should be at liberty to prosecute their claims against testator's estate as though no reference had been made, the Court of Chancery held the award void for not deciding the various claims existing between the co-defendants. (*Turner v. Turner*, 3 *Russ*, 494.)

Arbitrator must settle form of conveyance.

Where in a reference the defendant was ordered to pay the plaintiff a sum of money, unless within twenty-one days he should exonerate himself by affidavit from certain payments and receipts, in which case he was to pay a less sum, the award was held bad. (*Pedley v. Goddard*, 7 *T. R.*, 73.) And if an arbitrator award that a party shall execute conveyances to be settled by such counsel as he, the arbitrator, shall appoint, the award is bad; as, although he need not of necessity draw the conveyance himself, he should indicate the form of it, and not leave that to the discretion of the conveyancer employed. (*Tandy v. Tandy*, 9 *Dowl.*, 1044.)

AWARD MUST BE CERTAIN.

Award must be certain,

The award must be certain in order to be effective

and binding upon the parties, and so formed that no reasonable doubt could, upon the face of it, exist in any person's mind as to the real scope and meaning of the document, or the intention of the arbitrator in drawing it up. In this matter the Court will give the arbitrator every advantage, and do their utmost to give his award certainty, if it is possible to do so. If the award show such a certainty as was contemplated by the parties to the submission, it will be upheld; but uncertainty in a material part of it will be fatal. (*Hawkins v. Colclough*, 1 Burr, 274.)

Court will strive to make the award certain.

Uncertainty in material part fatal.

Uncertainty or want of conclusiveness in an award does not, *prima facie*, make it void where it can from circumstances be made certain or conclusive; as where a sum of money was ordered to be paid within a certain time from the date of the award, and the award bore no date, it was held to be sufficiently certain. (*Archbold*, 13th Edit., 1337; *Armit v. Breame*, 1 Salk, 76, 2 Lord Raymond, 1076.) The date of the award in this case would be calculated from the publication of it, from which time, as we have shown, it alone begins to be effective. And, where a bond was ordered to be given up to be cancelled within a certain time from the date, without stating the date, it was considered sufficient. (*Bell v. Gipps*, 2 Lord Raymond, 1141.)

Where award has no date, time counts from publication.

Where an arbitrator states facts to raise a question of law for the Court, the facts should be stated with such a degree of certainty as will enable the Court to draw their conclusions of law from them, and should not leave any fact to be implied by the Court. (*Redman on Arbitrations*, p. 126.)

Stating facts before Court to raise a question of law.

Uncertainty not fatal, if it can be made certain.

As to place.

When it is doubtful whether matter is decided, or how decided.

Award to pay money is good, although no time is fixed.

Where some act has to be done, time must be certain.

When payment of money awarded, precise sum to be mentioned.

Where award directs payment of value of land, and directs one party to give the other security.

The award will be made certain where it can be effected without unduly interfering with its provisions; all cases of uncertainty being governed by the legal maxim, "*id certum est quod certum reddi potest*," It is not necessary for the arbitrator to fix the place at which the payment of money awarded must be made, but if it is doubtful whether the award has decided the question referred, or if it be uncertain how it has decided the matter referred, the award will be invalid. (*Russell on Arb.*, 6th Edit., p. 292.)

An award to pay money or execute a release is sufficiently certain although no time is mentioned for the performance of either of those actions, as either of them must be done within a reasonable time. (*Freeman v. Bernard*, 1 *Salk*, 69.) But when an act is ordered by the award to be done, the direction should be given in unmistakeable language, and such as to leave no possible doubt on the minds of the parties who have to perform it. (*Price v. Popkin*, 10 *A. & E.*, 139.)

Where an award directs the payment of a sum of money by one party to the other, the terms should not be ambiguous, but the precise sum should be mentioned. An award that orders one party to pay the other so much money as is due "in conscience," without fixing the amount, is void for uncertainty. (*Watson v. Watson*, *Sty.*, 28.) Such also would be the case where the award ordered one party to pay the other so much as the land was worth, without determining the value of such land. (*Titus v. Perkins*, *Skin.*, 247.) Also, where the award directed that one party should give security for money, with-

out stating what the security was to be, the award was held bad. (*Thinne v. Rigby*, *Cro. Jac.*, 314.)

“The award is bad that directs one party to pay so much for every quarter of malt, as malt may be sold for at the time of the award, without stating in what place the sale shall take place” (*Comyns' Digest, Arb.*, *K.*, 11), for the price of malt is fluctuating and may sell for more in one place than it does in another; and the award was held bad where it directed one of the parties to deliver up certain specified goods, three boxes and *several* books, without naming the books, or stating their number. (*Cockson v. Ogle*, 1 *Lut.*, 550.)

Property awarded must be specified.

It will be seen that a reasonable degree of precision is required from the arbitrator in his award so as to show what his intention is, and to enable that intention to be effected, if an application to the Courts is necessary. The aim of every arbitrator, however, should be to make his award as clear, precise, final, and complete as possible, not only for the sake of the satisfaction thereby afforded to himself, but in order to avoid having the matters in the reference remitted back to him for his re-consideration and re-determination.

Reasonable precision necessary.

AWARD OUGHT TO BE MUTUAL.

“Awards must not be on one side only; for as all disputes referred to arbitration are those between two parties, that which is awarded to be done to one must be an advantage to both, so as to end the controversy and discharge one from his obligation and give

Award must be mutual.

satisfaction to the other; for if it do not it is manifestly unjust, and therefore whenever it appears to the Court that, notwithstanding the award, the thing remains a duty as before, and is not discharged, that apparently is an award on one side, and consequently void." (*Bacon's Abr. Arb., F., 3.*)

Award should be just as between parties.

When we say that an award should be mutual, it would perhaps be better to say, should be "just;" as, strictly speaking, there is no mutuality between parties either to an action at law or an arbitration, because one of them must take an adverse decision; and although, both in an action at law and an arbitration, the endeavour of the authorities should be to place the parties as far as possible in the same position that they formerly occupied towards each other, or in other words, to confer upon each of them a mutual benefit or advantage, still experience goes to prove that such endeavours never meet, in actual practice, with the success that they deserve. We usually find that after the action is over the settlement of fees alone too frequently causes an aching void that all the mutuality in the world can never fill. However, an award ought to direct that the thing to be done shall be a final discharge of the matters in reference; and "if one party alone be ordered to do something, and nothing else appears to the Court, it shall be presumed that he alone is the wrong doer, and the award is good if it appears that he is, by the award, discharged of all actions that might be brought against him for that wrong; but when it appears that the arbitrator designs both parties satisfaction for the wrong done, there if the satisfaction designed be not well awarded, the whole

Award should leave nothing to be done in the future.

shall be void for the partiality." (*Bacon's Abr. Arb., E., 3.*) An award therefore should be mutual in so far that it is not manifestly unjust to one party.

AWARD MUST BE POSSIBLE, REASONABLE,
CONSISTENT, AND LEGAL.

An award will be void if it be impossible of performance; as if it directed one of the parties to do some act out of his power, or if the arbitrator direct a thing to be done which is impossible, "*ex natura rei*," it is void; "as if they award a sum of money to be paid at a day past, or that one party shall deliver up a deed not in his custody." (*Bacon's Abr. Arb., E., 4; Lee v. Elkins, 12 Mod., 585.*) But if the award direct the performance of an act difficult to carry out, but which is not in itself contradictory or repugnant, it is valid; e.g. an award directing one of the parties to pay £20, when he is not in possession (either present or prospective) of that amount; for there is nothing contradictory in the award itself (*Bacon's Abr. Arb., E., 4*). If the award directs one of two things to be done, one of which is impossible, the award is not void on that account if the other act is capable of performance; and the party will be bound to do the act, that is the possible alternative. (*Wharton v. King, 2 B. & Ad., 528; Simmonds v. Swaine, 1 Taunt., 548.*)

Award must be possible.

Award not void because difficult.

Where one of the acts awarded is possible.

An award ought also to be reasonable; therefore, "an award that one shall serve the other for two years is void, also an award that one party shall release his right to the land in satisfaction of a trespass."

Award must be reasonable.

Award must
be consistent

(*Comyns' Digest. Arb., E., 13*); is void in both cases as being unreasonable. The award must also be consistent throughout, for if one part of it is inconsistent with the other, or contradictory, it will be void; and where an arbitrator directed by his award that A should pay B £100, and that both should give general releases, and subsequently B should pay A £20, the award was held bad. (*Redman on Arb., p. 137, and see Ames v. Milward, 8 Taunt., 367.*) If an arbitrator direct by his award any act to be done that is illegal and contrary to the law, the award is bad so far as that act is concerned; as where a sum of money due to one of the parties and stated on the face of the award to have arisen out of some illegal transaction between the parties, the award directing such sum to be paid was held bad; as regards that amount only. (*Aubert v. Maze, 2 B. & P., 371.*)

and legal.

AWARD BAD IN PART.

Award bad in
part,

An arbitrator in giving his award may, from a mistaken idea of his power, exceed his authority and give his decision on certain points on which such decision is not required; or may, on the other hand, exceed the authority conferred upon him by the submission. And although in the olden time an award bad in part was considered wholly void, it is now a fixed principle of law that an award bad in part is only void so far as that part is concerned; that it stands good so far as the other part is concerned—that is, of course, where the two parts are separable and can be divided one from the other. If such

is only void so
far as the bad
part is
concerned.

division cannot be made, the award is bad *in toto*. (*Addison v. Grey*, 2 Wils., 293; *Seckham v. Babb*, 8 D. P. C., 167.) And where an arbitrator exceeds his authority in going beyond the terms of the submission in order to direct the mode in which any of the matters awarded are to be done, that part of the award may be rejected as a nullity. (*Aitcheson v. Cargey*, 2 Bing., 199.)

Where, amongst other directions given by the award, an arbitrator ordered certain works to be performed, and extended the time for making his final award so as to be able to decide future disputes, the award was held to be bad so far as that part was concerned in which the arbitrator reserved to himself the power of deciding future disputes. (*Manser v. Heaver*, 3 B. & Ad., 295.)

Arbitrator
cannot
reserve future
authority.

An arbitrator, having the power of a judge at *Nisi Prius*, ordered the payment of costs and damages at a certain time and place, and did not award execution. The part of the award referring to time and place was considered as surplussage, and the award was void *pro tanto*. (*Rees v. Waters*, 16 M. & W., 263.) And where an arbitrator reserved to himself power to appoint a lawyer to advise with him as to the proper form of certain conveyances which he had ordered to be prepared, it was held that he had exceeded his authority and had no power to make any such appointment, and that that part of the award, being inseparable from the rest, the whole was bad. (*In re Tandy*, 9 D. P. C., 1044.) So where an arbitrator awards costs, and the submission gives him no power over costs, that part of his award will be

Incomplete
award.

Where
award not
separable,
whole is bad.

Not to exceed separated from the rest, and treated as void.
 submission. (*Aitcheson v. Cargay*, 13 *Price*, 639.)

And where an arbitrator orders mutual releases on payment of a sum of money over which he has jurisdiction, and also of a sum over which he has none, the former part of the award will be good and the latter void. (*Pickering v. Watson*, 2 *W. Bl.*, 1117; *Kendrick v. Davies*, 5 *D. P. C.*, 693, *Doe d. Williams v. Richardson*, 8 *Taunt*, 697).

Where an arbitrator, to whom a cause was referred by rule of Court, before issue joined, awarded as follows:—"I award and direct that a *verdict* in this cause be finally entered for the plaintiffs, with £—— damages," the Court held that he had exceeded his jurisdiction in directing the entry of a verdict, and that as the award was not capable of separation, being only in one sentence, it was bad altogether. (*Jackson v. Clarke, M' Clel. & Y.*, 200.)

Error in
 award in
 fatal."

And an error on the part of the arbitrator as to awarding costs, does not vitiate the whole of the award, but will [be void as to that part only by which such costs are awarded. (*Roberts v. Eberhardt*, 28 *L. J.*, *C. P.*, 74.) And where plaintiff was ordered to pay costs of the reference as between solicitor and client, and that defendant should pay plaintiff £50 towards such costs, it was considered that the award of costs between the solicitor and client was so mixed up with other parts of the award as to be inseparable, and the whole of the award was consequently rejected. (*Seccombe v. Babb*, 8 *D. C. P.*, 167.)

Where bad
 part of award
 is considera-

Where consideration for the thing awarded to the other side is bad, the award will be void *in toto*; and

an award that one party should pay for task-work, without mentioning the sum to be paid, and that the other party should pay £25, and that both parties should afterwards execute mutual releases, it was held void, *in toto*, on the ground that the payment for doing the task-work was uncertain, and that that was a consideration for the money to be paid by the other party. (*Pope v. Brett*, 2 *Saund.*, 293; *Comyns' Digest*, *Arb.*, E., 14.)

tion for thing
awarded
award void.

If an arbitrator decide on matters outside his authority, and by so doing affect his authority in matters within the submission, the whole award will be set aside. (*Marshall v. Dresser*, 3 *Q. B.*, 878).

CHAPTER VII.

HOW TO AWARD ON A CAUSE.

As actions at law or in the Chancery Division are frequently referred to the arbitrator for his decision, as well as matters in an action, it is necessary that the arbitrator should fully understand this part of his duty; how to make his award when a cause has been referred to him from the Courts, and also, what is a sufficient determination in his award of the questions in reference.

It appears that it is sufficient if he give an award that definitely concludes the matter in dispute, and it is not necessary that he should find for the plaintiff or the defendant expressly. (*Allen v. Lowe*, 4 *Q. B.*,

Award must
definitely
conclude the
matter.

Arbitrator
need not set
out the
pleadings.

Should
award on
each issue.

66.) And where an action is referred, he need not, in his award, set out the pleadings. (*Johnson v. Latham*, 20 L. J., Q. B., 236.) But it is sufficient if he find in the words of the issue. (*Wykes v. Shipton*, 3 N. & M., 240.) Where an action has been referred in which there are several issues, the arbitrator should, if requested, direct how all the issues are to be determined. (*Woof v. Hooper*, 6 Scott, 281; 4 *Bingham*, N. C., 449; *Williams v. Mouldsdale*, 7 M. & W., 134.) Before the Jud. Acts were passed, in cases where the costs of the action were to abide the event of the award, and there were several issues, the duty of the arbitrator was to find on each issue—even in the absence of a request to that effect—in order to enable the officer, whose duty it was to do so, to tax the costs of the reference. (*Kilburn v. Kilburn*, 13 M. & W., 671; 2 D. & L., 33; also *Waddle v. Downman*, 12 M. & W., 562; 1 D. & L., 569.) It was not, however, necessary for the arbitrator to find *specifically* upon each issue, if it could be clearly inferred by the award in which way each of the issues had been decided. (*Humphrey v. Pearce*, 22 L. J., Ex., 120.)

Where
damages are
claimed
award should
state precise
amount.

Award must
not give
greater
damages than
are claimed.

If an action is referred, in which damages are claimed, the award should state clearly the amount of damages that are due to the party entitled to recover. Where an action is referred to an arbitrator, and damages are claimed in such action, he cannot award a greater sum for damages than the amount actually asked for. If he did so, judgment would be entered up for the amount only claimed by the plaintiff in the action. (*Prentice v. Reed*, 1 Taunt., 151.) And

if judgment is by mistake entered up for the amount wrongly awarded, the Court will allow an amendment. (*Prentice v. Reed*, 1 *Taunt.*, 151.) But before the Jud. Acts they would not allow any amendment of the declaration, even though it could be shown by affidavit that a greater debt could be proved before the arbitrator to be due and owing. (*Pearce v. Cameron*, 1 *M. & Sel.*, 675.) The arbitrator can now amend his award if the order of *Nisi Prius* gives him power to do so. (*Archbold*, 1345, 13th Edit., *see note.*)

Before
Judicature
Acts no
amendment
allowed.

Amendment
allowed since
Judicature
Acts.

An arbitrator is also bound to the same extent and in the same manner as a Judge and Jury would be, by the statement of claim delivered in an action, and is not authorized to exceed the particulars of demand, or to direct the defendant to pay a larger sum than is claimed. But as the *particulars* of the plaintiff's demand are not of necessity before the arbitrator, even where the cause is referred at the trial, if it is intended to limit the plaintiff's demand to the amount claimed by the *particulars*, they should be brought before the arbitrator. (*Kenrick v. Phillips*, 7 *M. & W.*, 415.)

Arbitrator is
bound by
statement of
claim.

If an arbitrator have referred to him a submission of all the matters in dispute between parties who are partners, and he award that the partnership shall be dissolved, it has been held to be a good award. (*Green v. Waring*, 11 *W. Bl.*, 475.) But he is not bound by the terms of the submission to dissolve the partnership. (*Simmonds v. Swains*, 1 *Taunt.*, 548.) An arbitrator was, by the submission, authorized to decide upon what terms a partnership agreement should be dissolved; awarded, *inter alia*, that one

What award
may direct in
partnership
disputes.

of the parties should be entitled to all the debts due to the firm, and, if necessary, sue for them in the name of his late partner; it was there held that the arbitrator had not exceeded his authority in allowing one partner to sue in the name of the other for the recovery of such debts. (*Burton v. Wigley*, 1 *Bing., N. C.*, 665; *Goddart v. Mansfield*, 19 *L. J., Q. B.*, 305.)

Award can
restrain
partner from
carrying on
business.

An arbitrator, where he is empowered by the submission to settle the terms of the dissolution, has authority to restrain one partner from carrying on the same business within a certain distance from the particular town in which the partnership business was carried on. (*Morley v. Newman*, 5 *D. & R.*, 317.) As an arbitrator cannot order a verdict or a judgment to be entered, it is usual, when a cause is referred, whether it is referred before trial or at *Nisi Prius*, expressly to direct in the submission the entry of a verdict. But see as to this point. (*Everest v. Ritchie*, 31 *L. J., Ex.*, 350.)

Before
Judicature
Acts arbi-
trator should
state how
much due in
the cause
and how
much in the
reference.

It was formerly held that where a cause and all matters in dispute were referred, the arbitrator should state in his award how much was due in respect of the cause and how much in respect of the matter in dispute, so as to show clearly that he had not exceeded the limit assigned to the cause. Whether that would be so now is not very clear, but it would be necessary to state this in order to get a verdict entered for the cause. (*Taylor v. Shuttleworth*, 6 *Bing., N. C.*, 277; *Bonner v. Charlton*, 5 *East*, 139.)

No finding on
issues neces-
sary where

If a cause only is referred, the arbitrator cannot give an award on all matters in difference between

the parties, neither can he, without express direction in the submission, order a verdict or a judgment to be entered. (*Atkinson v. Jones*, 1 D. & L., 225; *Hawkyard v. Stocks*, 2 D. & L., 936.)

the arbitrator is to tax costs.

Where, on a reference of a cause and all matters in difference between the parties all costs are to abide the event, and the arbitrator is to tax such costs, it will be a sufficient decision if, by his award, he direct one party to pay a certain specified sum to the other; and he need not decide each of the issues separately, or state the amount of the costs separately. (*Bradley v. Phelps*, 6 Ex., 897.)

Where, on a reference of a cause, only the costs of the reference and award, and not the costs of the cause, abide the event, the arbitrator need not find upon each specific issue unless expressly directed to do so by the submission, for the costs of the reference and award are determined by the action. (*Duckworth v. Harrison*, 4 M. & W., 432.)

Where costs of cause do not abide event.

Where one of the parties to the reference admits the claim of the other, but seeks to reduce the amount of the balance by a set-off, the award is good, if it find a sum due to one of the parties by the other without making any mention of the set off. (*Brown v. Croydon Canal Co.*, 9 A. & E., 522.)

Where one party admits claim of the other.

Where the arbitrator, without being so authorized by the submission, directs that the verdict shall be entered for the plaintiff for a specified sum, it does not amount to an order to the defendant to pay that sum, neither can the payment be enforced by attachment, but the award will be held to be void. (*Hawkyard v. Stocks*, 2 D. & L., 936.)

Where arbitrator exceeds his authority.

Arbitrator finding for plaintiff should award damages.

Where an arbitrator finds for the plaintiff, either in the whole of the statement of claim or on that part only not covered by the statement of defence, he should state the amount of damages due to the plaintiff, as where he omitted to do so the award was held bad. (*Wood v. Duncan*, 7 Dowl., 91.)

CHAPTER VIII.

AWARDING COSTS.

Costs of award and reference.

Arbitrator cannot award costs unless empowered by sub. mission.

Costs in the cause.

Costs of the reference.

As the question of costs is of some importance in the matter of arbitration, and as it is frequently the arbitrator's duty to award them, it will be as well to show in this chapter what are the costs in the cause; the costs of reference and award; and the circumstances under which the arbitrator is justified in awarding them. In the first place, we may observe that the power of the arbitrator to award costs depends entirely upon the terms of the submission. If the submission is silent upon the point, and if there is no cause in Court to be referred, the arbitrator has no power to award costs.

The costs in the cause are the costs incurred up to the time of the submission, as well as the cost of the order of reference, including the making such reference a rule of Court and the subsequent proceedings in the matter up to, and including, the making of the award, and any after proceedings.

The costs of reference are the expenses incurred by all parties to the reference, whether in respect to matters in the cause, or matters out of it, and include the costs of attendance of witnesses examined before the arbitrator to prove the issues in a cause, and the charges of the arbitrator. (*Brown v. Nelson*, 13 M. & W., 397.) The costs of an accountant employed by the arbitrator to examine the books of the defendant, and also of the attendance of the plaintiff's solicitor with the accountant, are costs of the reference. (*Hawkins v. Rigby*, 29 L. J., C. P., 228.)

Costs of
award.

The costs of the award are the amount of the arbitrator's charges, and are deemed part of the costs of the reference; they are usually paid when the award is taken up, and, as we have seen, the arbitrator can refuse to give up the award until such charges are paid. (*In re Coombs*, 4 Ex., 839.) If a cause is referred, and the submission makes provision that the costs shall either abide the event, or be at the discretion of the arbitrator, the costs (if there is no qualifying expression) will include the costs of the reference, as well as of the award, and costs of cause (*Wood v. Kelly*, 9 East, 436); in other words, all the costs of the action. Where, by the terms of the submission, the costs are to abide the event, the arbitrator has no power over them, but the party in whose favour the award is made will be entitled to them; and if the award be partly in favour of one party and partly in favour of the other, each party will have to pay his own costs, even though one of the parties to the award, and by virtue of it, has a substantial advantage over the other. (*Gore v. Baker*, 4 E. & B., 470;

Where costs
abide the
event.

Kelsey v. Stupples, 32 L. J., Ex., 6.) Where an action and all matters in difference were referred, and the costs of the reference and award were to abide the event of the award, the arbitrator awarded a sum of money to the plaintiff in respect of the action, and found for the defendant as to the matter in difference for £6 due from the plaintiff to the defendant, and directed payment of the amount, the Court held that the plaintiff was not entitled to the costs of the reference and award, as the arbitrator had awarded in favour of each party. (*Gribble v. Buchanan*, 18 C.B., 691; *Reynolds v. Harris*, 28 L. J., C. P., 26.) In this case, as neither party had failed but both had partially succeeded, neither party could be called upon to pay the costs, the award not being wholly decisive. Where a cause is referred, and the costs of the reference are in the discretion of the arbitrator, and the costs of the cause only are to abide the event, the arbitrator may deal with the former at his discretion (*Brown v. Nelson*, 13 M. & W., 397); and where a cause is referred, the costs of the reference are not usually costs in the cause, which latter only include the costs up to the time of reference. (*Macintosh v. Blyth*, 8 Moore, 211.)

Where
verdict is
taken subject
to reference.

But where a verdict is taken, subject to a reference of the action to an arbitrator who has to certify for whom and for what amount the verdict shall be entered, and the costs of the action and the reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the verdict. (*Archbold*, 18th Edit., p. 1346; *Deere v. Kirkhouse*, 20 L. J., Q. B., 195.)

As to refer-
ence of
accounts
which are
accounts in
an action.

In a reference of accounts, including accounts which are the subject of an action, the party who has the award in his favour is entitled to the payment of his costs. (*Hemsworth v. Bryan*, 1 C. B., 131.)

Where the arbitrator has discretion as to costs.

If an arbitrator has power to award costs at his discretion, he may order either of the parties to pay the whole of the costs, or divide them equally between both parties, or he may make the successful party pay the whole amount. (*Proudfoot v. Poile*, 15 M. & W., 198; *Rose v. Redfern*, 10 W. R. 91, *Ex.*) But where a reference contained this clause, that the costs of the agreement of reference, and of the reference and award, should be in the discretion of the arbitrator and be defrayed as he should direct, and the arbitrator in his award directed that the defendant should pay a certain sum to the plaintiff, but the award was silent as to costs, it was held that the award was void. (*Richardson v. Worsley*, 19 L. J., *Ex.*, 317.)

Where the arbitrator awards each party to pay half the costs,

It appears that if the arbitrator award each of the parties to a reference to pay half the costs incurred, one of the parties may pay all the charges, and, by so doing, obtain the award from the arbitrator; and afterwards, when he wishes to recover from the other party the amount of fees that he has over-paid, he has the same remedy against him as he would have had if the opposite party had refused to obey any other part of the award; but the objection to awarding so important a matter as the payment of costs in that loose way are many, and the safest way is to state clearly what proportion of the costs of the reference, and of the award, shall be paid by both the parties. (*Bates v.*

if either pay all the charges, the other party to repay half.

Townley, 2 Ex., R., 152.) In order also to avoid any objection likely to arise on this point, it is usual to order in the award that if either of the parties pay all the arbitrator's charges, for the purpose of enabling him to take up the award, then, in that case, the other party shall repay him half the amount. (*Marsack v. Webber, 6 H. & N., 1.*) In a reference where the costs of the reference and award were to be in the discretion of any of the arbitrators, or of any two of them, "who shall by their award order and direct by whom, to whom, and in what proportion and manner the same shall be paid," the two arbitrators awarded that A, B, and C should pay the costs of the award, and the compensation to the arbitrator, in equal proportions, the award was held good, although it did not mention, or direct, in what manner the said costs were to be paid, or by whom, or to whom; as it sufficiently indicated that each of the parties should pay a third of the whole amount. (*Re Young and others, 22 L. J., C. P., 160; Archbold, 13th Edit., p. 1347.*)

Joint payment of costs.

COSTS OF THE CAUSE.

"Costs to abide the event."

In connection with this question of costs we frequently come across the expression, "costs to abide the event," and it is only natural to ask the question, What event do the costs abide? Is it the event of the award or the event of the cause, or the general event of the whole award? This is a somewhat difficult question to answer, and it depends upon the wording of the submission. If the submission only provides that "the costs" are to abide the event and is silent

Word "costs" only refers to costs of whole event.

as to what costs, the word costs applies to the costs of the whole event—that is, the reference and the cause referred.

Where the “costs of the cause” are to abide the event, the expression there is taken to mean the costs in the action, and not the whole costs including the reference and award. Where the costs, both of the cause and the reference, are to abide the event, that appears to mean the general event of the reference; and unless all the issues are awarded in favour of one of the parties, each party will have to pay his own costs. (*Wood v. O’Kelly*, 9 *East.*, 436; *Boodle v. Davies*, 3 *A. & E.*, 200.)

“Costs of
cause” to
abide event.

In *Cooper v. Pegg*, reported in 24 *L. J., C. P.*, 167, the Judges declined to give an opinion on the effect of an agreement “that the costs abide the event.” L. J. Jervis remarked, referring to the case before him, “what may be the effect of the agreement that costs of the suit are to abide the event of the award I do not say,” and Crowder, J., said, “I give no opinion as to the effect of the agreement that the costs are to abide the event of the award” upon the present finding (that was upon the finding of the arbitrator in the cause); and in the case of *Ellis v. Desilva*, 6 *Q. B. D.*, 54., it was held that the word “event” ought to be construed distributively, and the award was remitted back to the arbitrator for him to find specific issues, so that the officer could tax the costs of each issue respectively.

Where the submission is silent as to the costs of an action it is in the power of the arbitrator to order either party to pay them; although no express autho-

Where
submission is
silent as to
costs.

Costs to abide event, taxed as upon verdict.

ity is given to him upon that subject either by the rule or order of reference; but if either the rule or order of reference direct that costs are to "abide the event," the arbitrator cannot exercise any discretion in the matter, either in awarding them or fixing their amount, and need not even notice them; but in that case the costs follow, and are taxed in the same way as though the award were the verdict of a jury. (*Firth v. Robinson*, 1 B. & C., 277; *Kendrick v. Davies*, 5 Dowl., 693; *Daubrey v. Rickman*, 1 Scott, 564.)

Award should be specific on each issue submitted.

Reference of cause and suit in equity to abide event.

Where a cause and all matters in difference between the parties was referred, and the costs of the cause were to abide the event, the arbitrator found for the plaintiff as to the cause for the sum of £259 ls., and, as to all the matters in difference, for the defendant for the sum of £242 13s. 10d., and it was held that "the event" of the reference was for the plaintiff, and he was entitled to his costs of the action. (*Stephens v. Chapman*, 40 L. J., Ex., 123.) So that it will be seen from the cases that the award should be specific as to the issues before the arbitrator, and that his duty is to give his award upon each specific issue, so as to enable his intention to be carried into effect without injustice to either party. Where a cause and all matters in difference—and, amongst the matters in difference a suit in equity—were referred, and the costs were "to abide the event," the arbitrator found on some of the issues in the cause for the plaintiffs, and awarded them damages; but as to the suit in equity, or rather as to so much of it as affected the plaintiffs, he restrained them from

proceeding with it, and also that they should not take action to recover the damages awarded them by the said arbitrator nor the costs, it was held that the event in this case meant the ultimate and general event of the whole cause, and not merely that the event of each suit should, as regarded that suit, abide the event. (*Reeves v. Macgregor*, 9 *ad.*, E., 576.)

Where the costs are to be at the discretion of the arbitrator "who is to ascertain the same," it is his duty, before awarding, to ascertain and determine the amount (*Morgan v. Smith*, 9 *M. & W.*, 427), otherwise the award will be bad, and cannot be rectified by the taxing master on taxation. The arbitrator should not, by his award, fix his own charges, even if the costs of the reference and award are left to his discretion; but, as he has the right to keep his award (as we have seen) until his charges are paid, he should direct in the award by which of the parties his costs are to be paid, and leave it to the taxing master to decide as to whether his claim is just: and if the amount paid on delivery of the award is excessive, and the arbitrator refuse to refund the overcharge, the party who has had to pay such excessive charge may recover, in an action, for money had and received. (*Fearnley v. Branson*, 20 *L. J., Q. B.*, 178; *in re Coombs*, 5 *Ex.*, 839.) But it does not appear that the Court will set aside or interfere with the award on the ground that the arbitrator has therein named the amount of his charges, unless there is evidence before the Court that such charges are excessive (*Rose v. Redfern*, 10 *W. R.*, 91, *Ex.*); but where, in an award, the arbitrator had fixed his own

Costs at discretion of arbitrator.

Arbitrator should not fix his fees by the award.

Award not set aside if fees are specified in it.

charges and ordered one of the parties to pay them, the Court refused to order the sum awarded to be enforced by attachment. (*Parkinson v. Smith*, 30 *L. J., Q. B.*, 178.)

Costs of
second
award.

In case of
second award,
party in fault
to pay costs
of first
award.

Where an award is referred back by the Court on the ground that it is defective, and the arbitrator hears fresh evidence and makes another award, the costs of such second reference will be borne equally by both parties. (*Blair v. Jones*, 6 *Exch.* 701.) But if the second award has been rendered necessary by the conduct of one of the parties in the reference, the party who is in fault will have to bear all the costs in connection with the first award. (*Gladwin v. Chilcote*, 9 *Dow.*, 550.) Where an action and all matters in difference are referred, the arbitrator may order either of the parties to pay the costs of the cause, but not of the reference and award; although the rule of Court, or order of reference, were silent upon the question of costs. (*Roe d. Wood v. Doe*, 2 *T. R.*, 644; *Whitehead v. Fish*, 12 *East*, 165).

Where
submission
made rule of
Court the
Master can
tax costs of
award.

Where the submission has been made a rule of Court, the Master of the Court has jurisdiction to tax the cost of the reference and award, although no cause is before the Court at the time of the reference. (*Bhear v. Hanadine*, 21 *L. J., Ex.* 127.) But the arbitrator has no power to order the costs to be taxed by any other person than the proper officer appointed for that purpose, as that would amount to a delegation of judicial authority, and his award would be bad.

Taxing of
costs is
ministerial.

The taxing of the costs by the Master of the Court is considered a ministerial act, but by a stranger it is a judicial act; and an arbitrator, although he cannot

order a further judicial act to be done, may reserve a ministerial act to be done either personally or by a stranger, and either before or after the giving of the award. (*Knott v. Longe*, 2 *Strange*, 1023; *Thorpe v. Cole*, 2 *C. M. & R.*, 367.) An arbitrator can only award costs as between party and party, unless he is directed to do so by the order of reference (*Whitehead v. Fish*, 17 *East*, 165.); but in a reference in a Court of Chancery before the Jud. Acts, L. J. Mellish held that where both the costs of the reference and of the suit are left to the discretion of the arbitrator, that gives him jurisdiction to give costs as between solicitor and client (*Mordue v. Palmer*, 49 *L. J., Ch.*, 10), but when an arbitrator awards costs as between solicitor and client, and the costs are so taxed, the Court should be moved to set aside the award, not to review the taxation. (*Bartle v. Musgrave*, 1 *Dowl., N.S.*, 325.) An error as to costs does not necessarily invalidate the whole award. (*Aitcheson v. Cargey*, 9 *Moore*, 381.)

Where costs of reference and of cause are left to discretion of arbitrator.

Where in a reference of two causes, damages in the first cause were ordered by the award to be set off against the costs, and in the second an order to the prejudice of the solicitor's lien for his costs in the first cause, it was held void as being in contravention of the rule of the Court. (*Cowell v. Betteley*, 9 *Bing.*, 432.)

Where a reference is (by consent) before trial, and the costs are to abide the event, the plaintiff will generally get his costs if he succeed (notwithstanding the County Courts Act), whatever damages he may recover. (*Frearn v. Sargent*, 32 *L. J., Ex.* 281.)

The County Courts Act, 13 & 14 Vic., c. 61, s. 11, provides that if a plaintiff shall recover less than £20 in an action, he shall not be entitled to the costs. On an appeal to quarter sessions it was ordered that the matter in dispute should be referred to arbitration. The arbitrator awarded that the appeal be dismissed, and that the appellants pay the costs of the appeal; but, as the order of reference was silent as to costs, it was held that the arbitrator had no power to award them. (*West London Railway Co. v. Fulham Union and Parish*, 5 Q. B., 361.)

When arbitrator can award cost.

Court will not review his decision as to costs.

An arbitrator has a very considerable power over costs when he is directed to award them. If the submission contains no direction as to costs, he may award a gross sum to be paid, and the Court will not review his direction on that ground unless the amount is so excessive as to call for its action. Where the costs of the agreement and of the reference and award were to be in the discretion of the arbitrator, and "to be defrayed as he should direct," and the arbitrator in his award made no mention of costs, the award was held bad. (*Richardson v. Worsley*, 19 L. J., Ex., 317.)

The London County Courts Act, 1869; the Railway Clauses Consolidation Act, 1845; the Companies' Clauses Consolidation Act, 1845; and the Railway Companies' Arbitration Act, all provide for the payment of the costs in any reference taking place under those Acts.

TAXATION OF COSTS.

Costs can only be taxed by Master.

Costs can only be taxed by the officer of the Court

appointed for that purpose, in cases where the submission is made a rule of Court, and also where the arbitrator has not awarded a gross sum for costs; but has awarded costs generally, with or without any express direction as to taxation by the Master. By rule 170, H. T., 1853, "costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed." Before that rule, the party in whose favour the award had been made was not entitled to have his costs taxed until the time had expired during which the unsuccessful party could have moved to have the award set aside. (*Hobdell v. Miller*, 2 *Scott*, N. R., 163.)

Where arbitrator awards gross sum for costs,

costs may be taxed before the time for setting award aside has expired.

Where a verdict has been taken at a trial, and the cause has been afterwards referred, and the costs of the cause, reference, and award, are to be paid by one of the parties, such costs should be taxed separately if it is intended to sign judgment for the costs of the action. And when the arbitrator directs the costs of the action to be taxed by the taxing master, they should be taxed as upon a verdict. (*Bignall v. Gale*, 4 *Sc.*, N. R., 570; *Allenby v. Proudlock*, 5 *N. & M.*, 636.)

There is no necessity to produce an affidavit to verify the award; although if only a copy of the award were produced, and the opposite party made objection to the taxation, the master would probably require the direction of the Court for his guidance in the matter. It is not usually the practice to allow the costs of more than one counsel appearing on either side—that is, in case of an ordinary reference. Of course, where it is considered necessary to have

No necessity to verify award.

Costs of more than one counsel not usually allowed.

Costs of
accountant.

more than one on account of the importance of the issues involved, the usual practice would be relaxed, and it lies in the discretion of the taxing master to decide when such necessity has arisen. In a case where an accountant was, by order of the arbitrator, called in to examine the defendant's books at his counting house, in order to be able to report, for the purposes of the reference, the amount of profit that had been made by the defendant on certain transactions as represented by such books, had no accountant been called in, the investigation of the said books would have been held before the arbitrator himself, and a great loss of time, and a much greater cost to the parties, would have been incurred; therefore the master, who taxed the costs of the plaintiff at the reference, allowed the charges of the accountant; but disallowed those of the plaintiff's solicitor attending the meetings. (*Hawkins v. Rigby*, 29 L. J., C. P., 229).

The arbitrator should be empowered by the submission to certify for costs, so as to give him the same power over them as a Judge has over the costs of a trial. Without that power his award has not the same authority as a Judge's certificate. When he has the power to certify and does not exercise it, the Judge, by whose order the cause was referred, has not power to grant a certificate, as the arbitrator by the submission has succeeded to all the powers of the Judge, and it is his duty to exercise them. (*Richardson v. Kensitt*, 6 M. & G., 712.)

Costs to be
taxed accord-
ing to the

The master must tax the costs according to the language of the award, and where there is a difficulty

as to the legal effect of the award, the Court will direct the master as to how the costs are to be taxed. (*Reynolds v. Harris*, 28 L. J., C. P., 26.)

submission. Court directing how costs are to be taxed.

When the evidence of a witness is not received by the arbitrator, and where he has good grounds for rejecting such witness, the cost of his attendance at the reference will not be allowed by the taxing master.

When arbitrator rejects evidence of witness, costs of latter not allowed.

The Court has no summary jurisdiction over the arbitrator as regards his charges, neither can it compel him to submit them to taxation. (*Dossett v. Gingell*, 2 M. & G., 870; *In re Combs*, 4 Ex., 839.) It is not usually the case that the arbitrator's charges are questioned by the taxing master, the latter generally passes them without inquiry. There is no particular scale of fees applicable to the case of a Queen's Counsel being appointed arbitrator, and the taxing master has discretion in all cases to allow such costs as the nature and difficulty of the case may require. (*Sinclair v. Great Eastern Railway Co.*, 39 L. J., C. P., 165.)

Court has no summary jurisdiction over arbitrator's charges.

When an arbitrator has power to certify for costs, he should not omit to do so, as, in case of his omission, the award will be referred back for him to amend it as to costs. (*Harland v. Mayor of Newcastle*, 39 L. J., Q. B., 69.) In one case an arbitrator was not allowed the costs of a solicitor who prepared his award; the taxing master considering that the arbitrator's charges for four days (£50 10s.) were quite sufficient to enable him to pay for such professional assistance as he required. (*Galloway v. Keyworth*, 23 L. J., C. P., 218.)

Arbitrator should always certify when he has power.

When the arbitrator awards the payment of costs

When day for
taxation is
named.

to the plaintiff, subject to proper taxation, and mentions some particular day before which such costs are to be taxed, it is the duty of the defendant, and not the plaintiff, to have them taxed before such day, and if he fail, the plaintiff can proceed *ex parte* with the taxation. (*Candler v. Fuller, Willes, 62.*)

GENERAL OBSERVATIONS ON THE AWARD.—WHAT THE AWARD MAY DIRECT.

Award must
not exceed
submission.

The award of an arbitrator must not, as we have seen, exceed the submission, nor interfere with matters that are not included therein; the arbitrator should adjudicate only upon the issues brought specifically before him, and he can only bind the parties to the submission, and not strangers; for although, as we have seen, his powers are great, yet his authority is limited and there are bounds which he cannot pass.

Arbitrator
cannot award
an act to be
done by
stranger.

Now an arbitrator cannot award an act to be done by a stranger to the submission, but he can award that the parties to the submission shall do some act to a stranger if it be for the stranger's benefit. "Neither can he award that two shall intermarry; for that ought to be at the choice of the parties, and the bodies of the parties are not submitted to the power of the arbitrator." (*Bacon's Abri. Arb., E. 3.*) Neither is

Nor that two
people shall
marry.

an arbitrator justified in making what he may consider to be a fair and equitable settlement of the question before him; where, therefore, in a reference respecting the title to land, an arbitrator directed that the defendant should have the brakes growing in it for the remainder of his life, the award was held bad;

Must decide
actual
questions.

as the title to the land was not determined by it, which title was the question to be settled. An arbitrator cannot bind a man's liberty or right to real property where only personal things are submitted; therefore, if the award direct that one party shall serve the other for two years, or if his award direct a release of the right to lands in satisfaction for a trespass, the award is bad (*Bacon, Abri. Arb., F.; Rolls' Abri. Arb., p. 243*); for nobody can be supposed to submit more than his personal estate to answer a personal injury, for his personal estate only might be taken in execution by the common law; therefore, if the arbitrators award a horse, money, or a quart of wine in satisfaction for a trespass, the award is good. (*Rolls' Abr. Arb., 243; but see Hems-worth v. Brian, 1 C. B., 131.*) So, on a reference as to the amount of rent due, an arbitrator has no power to award a distress for the recovery of the rent owing, unless the submission gives him such power. (*Pascoe v. Pascoe, 3 Bing., N. C., 898.*)

Cannot bind man's liberty.

Can award other satisfaction than money.

An arbitrator has no power to award the performance of a criminal act. Neither can he direct a party by his award to do anything that would make him a trespasser on the land of another; but if he direct the payment of money on a date which happens not to be a lawful day for the transaction of business, such as Sunday, the award will not thereby be invalidated. (*Bacon's Abr. Arb., E., 4.*)

Arbitrator cannot award performance of criminal act.

Payment of money on Sunday.

If the assignees of a bankrupt receive payment, by mistake, of a larger sum than is owing to the bankrupt's estate by the party making such payment, the arbitrator has power to order the repayment by the

Payment by assignees of bankrupt.

assignees of the whole amount of the money so overpaid. (*Malcolm v. Fullarton*, 2 T. R., 645.)

Has power
to allow
interest.

The arbitrator has a general power of allowing interest that one party may be entitled to. Whether *any* interest, and if so what amount is due, are questions of facts upon which the arbitrator has power to adjudicate. In questions as to partnership, he has, as we have seen, power to order a dissolution on a reference of "all matters in difference;" but cannot, without special authorization, appoint a receiver to collect the debts of the firm, and pay them according to his own direction; he is sometimes, however, appointed receiver himself. As an award that is vague and uncertain always tends to dissatisfaction, and frequently defeats the object of the reference, it will be seen how necessary it is to follow, in all things, the enabling clauses of the submission. Whether the arbitrator is empowered to order the performance of a certain act to be done by the parties, or is only to say what shall be done in certain cases; or whether his instructions only enable him to direct the payment of money, or to fix the amount due and owing by one party to another, in short, whatever he directs by his award to be done should be directed in plain language, so as to prevent the possibility of a mistake being made by anyone of ordinary intelligence. He should also confine his attention to matters within the scope of the submission, and not travel outside the powers that the submission confers. Sufficient has now been said as to the award and its requisites, to show the importance that attaches to it, as well as to the terms in which it should be framed,

Can dissolve
partnership.
Cannot
appoint
receiver.
May act as
receiver.

Award must
not be
ambiguous.

Should state
its purport
in clear
language.

Should keep
within sub-
mission.

and the necessity there is for those terms to be definite, clear, and precise.

CHAPTER IX.

REFERRING BACK THE AWARD.

ORIGINALLY the Court had no power, without the consent of the parties to the submission, to refer the award back to the arbitrator for his correction or reconsideration; and as he could not himself alter it after it had been published, the only thing to be done with it, or that could be done with it, was for the Court to set it aside; but the C. L. P. Act, 1854, 17 & 18 Vict, c. 125, s. 8, provides that "In any case where reference shall be made to arbitration as aforesaid, the Court or Judge shall have power, at any time, and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms as to costs and otherwise as to the said Court or Judge may seem proper." This clause empowers the Court or Judge to refer back the award for the arbitrator's reconsideration in cases where, before the act, they could have done so, if the submission had contained a clause giving them the power. (*Mills v. Bowyer's Society*, 3 Kay & J., 66; *Hodgkinson v. Fernie*, 27 L. J., C. P., 66.) It applies also to all compulsory references, as well as to references by consent; and the Court can refer back the award under

Referring
award back.

Power of
Judge to
refer back.

- that section, even though no motion has been made to set it aside. (*Morris v. Morris*, 6 E. & B., 383.)
- Award under L. C. C. Acts.** An award made when the submission is under the L. C. C. Acts, 1845, is within this section and may be referred back. In one case, a letter, alleged to have been written by one of the parties to the reference, was discovered after the award was made, and the arbitrator admitted that if it had been put in evidence, it would have materially altered his award; the Court, in that case, remitted the award back to the arbitrator, although it was sworn, by the party alleged to have written it, that the letter was a forgery. (*Burnard v. Wainwright*, 19 L. J., Q. B., 423.) Also, when more than one arbitrator is appointed, and the joint arbitrators have not duly executed the award in presence of each other, the Judge will refer back the award. (*Anning v. Hartley*, 27 L. J., Ex., 145.)
- Discovery of further evidence.**
- Where arbitrators have not jointly executed award.** An award in favour of the plaintiff was also referred back, because the defendant was described by a wrong Christian name. The plaintiff applied to the Court for a rule either to compel the defendant to pay what was awarded, or to remit the award, so as to have the mistake put right; the defendant objected, but the Court remitted the award for such correction to be made. (*Davies v. Pratt*, 16 B., 586; *Howett v. Clements*, 7 M. & G., 1044.)
- Where wrong Christian name inserted in award.** In a case where a letter-book containing copies of the various letters that had been produced in evidence before the arbitrator, and marked by him, was left in his hands at the close of the proceedings, so that he might be able to refer to them in order to make his award, and in his award he referred to the copy of a

letter contained in the book, but which was not marked by him as having been produced in evidence, the Court ordered the case to be referred back to the arbitrator, so that the party who was prejudicially affected by such letter should have an opportunity of explaining its contents (*Davenport v. Vickery*, 9 W. R., 701.)

An award will not be remitted back nor set aside for an alleged mistake in law attempted to be proved in affidavits, nor for the arbitrator to state a case when he has refused to do so (*Baguley v. Markwick*, 30 L. J., C. P., 342; *Gibbon v. Parker*, 5 L. T., N. S., 584). The arbitrator must not decline any part of the responsibility conferred on him by the submission, but must exercise his jurisdiction on all the points brought before him, as he is considered the final judge of law and of fact, and must act accordingly. (*Baguley v. Markwick*, see *supra*.)

Not referred back or set aside for alleged mistake in law.

Arbitrator must not decline jurisdiction.

By the section of the C. L. P. Act quoted above the application to refer back may, it is said, be made at any time; as the Court has power to refer back "at any time, and from time to time," if necessary so to do. The application should, however, for the convenience of all parties, be made as soon as possible after the award is published; or within a reasonable time after, preference being given to that time within which the Court can be moved to set the award aside. *Doe & Banks v. Holmes*, 12 Q. B., 951.

Award must be remitted back in reasonable time.

When it is necessary to refer the award back, it is usually remitted to the same arbitrator, and justly so, as he knows all the circumstances of the case and has heard and examined the witnesses, and has put him-

Award usually remitted to same arbitrator.

unless evidence of corruption.

self in possession of all the facts upon which he has to adjudicate. If there is evidence before the Court, of the corruption or misconduct of the arbitrator, and that it is of such a character as to invalidate the award *in toto*, it will not be referred back to the same arbitrator, but to another one to be chosen by the parties. (*Anning v. Hartley*, 27 L. J., Ex., 145.)

Where arbitrator took evidence secretly.

In a case where the arbitrator allowed a claim made by one of the parties, in the absence and without the knowledge of the other, and did not make a communication of the fact to the opposite side, Lord Romilly, who was then Master of the Rolls, refused to allow the award to be referred back to the same arbitrator, saying that his conduct in so allowing such claim was objectionable, notwithstanding his perfect honesty and good faith; but he considered the mind of the arbitrator would be biassed by his previous conduct, and that he would endeavour to make it appear that the objection made to his award was useless. (*Re Tidswell*, 33 Beav., 217.) Where a reference was made to several arbitrators, and one of them died after the award was made, and it was referred back, it was remitted to the same arbitrators, and a fresh one was appointed in pursuance of the submission. (*Lord v. Hawkins*, 2 H. & N., 55.)

Several arbitrators, death of one.

Where award referred back, all the arbitrator's powers revive.

When the award is referred back to the arbitrator, all the powers that he originally possessed under the submission are revived, so far, of course, as the matters referred back are concerned. Where the award is referred for the arbitrator's re-consideration and re-determination of one or two points only, he can-

Where one or two points only referred back.

not, as a general rule, revise the whole award, but must confine his attention to the point upon which he has to re-adjudicate, and he has no power whatever as to the other parts of the award. (*McRae v. McLean*, 2 A. & B., 946.) When the award is referred back, the arbitrator must hear all the additional evidence necessary to enable him to make a final award. Where an arbitrator had not awarded on one of the points contained in the submission, and it was considered that his award was not final, the Court, under a power contained in the submission, ordered "that the matters referred" be remitted back to the arbitrator for his re-consideration and re-determination. In this case the arbitrator was held bound to hear additional evidence tendered by one of the parties, which had come to the knowledge of such party since the making of the original award. (*Nickalls v. Warren*, 2 D. & L., 549.) But the arbitrator is not bound in every case to hear fresh evidence when the award has been referred back to him, but only when such fresh evidence is necessary to enable him to amend his award. He need not call any witnesses nor consult any of the parties to the reference in cases like the one we have quoted above, viz.—*Anning v. Hartley*, where the award was referred back simply for all the arbitrators to execute it with the proper and necessary formalities and for all to sign it together in the presence of each other. Neither would it be necessary to consult witnesses or parties where the simple correction of an error is all that is required, or in case of correcting the name of one of the parties,

Arbitrator must hear the additional evidence in case award is referred back.

Need not hear further extraneous evidence in all cases.

Improper execution by joint arbitrator.

Correction of error.

Correcting name of a party.

as no assistance is, in any of those cases, required by the arbitrator. (*Howett v. Clements, supra.*)

Where arbitrator had not decided a point.

Where an arbitrator had not decided a point in an account stated, and it was referred back to him for correction, it was held that he was not bound to rehear the evidence of the parties. (*Bird v. Penrice, 6 M. & W., 754.*)

Should incorporate the two awards.

In regard to making his second award, or amending the first, the plan that suggests itself most plainly is to incorporate the original and amending awards; i.e., to use the first award as far as possible, and then add what corrections are necessary to complete it; and if the arbitrator has no power in the submission as to costs in the first instance, neither has he in the second, unless special instructions to the contrary are inserted.

Arbitrator can be called as a witness.

There is no necessity to mention in the second award the order of the Judge or the rule of the Court referring back the matter for re-consideration. Although the arbitrator's power is at an end when his award is made, he may be called as a witness for the purpose of explaining it. (*Duke of Buccleugh v. Metropolitan Board of Works, 41 L. J., Ex., 137.*)

CHAPTER X.

CONSEQUENCES OF THE AWARD.

AN award, as we have shown, is a final and conclusive judgment between the parties as to the matters with which it has power to deal. It binds the parties to the submission, and precludes them from again raising the matters adjudicated upon in any Court of law or equity. (*Cleworth v. Pickford*, 7 M. & W., 321.)

The arbitrator's decision on questions as to the scope or the duration of his authority is not always conclusive (*Faviell v. The Eastern Railway Co.*, 2 Ex., 344): thus where, after the award was made, one of the parties wished to take the opinion of the Court upon it, and for the purpose of enabling him to do so the arbitrator stated the ground of his decision, in which he showed that he had entirely mistaken the order of reference; the Court set aside the award, although upon the face of it the decision was unexceptionable. (*Jones v. Corry*, 7 Sc., 106.)

Award is final and conclusive.

Binds the parties.

Arbitrator's decision as to extent and duration of authority.

Where arbitrator had mistaken order of reference.

When the award is made, one of the parties to the reference cannot afterwards bring an action to enforce a claim that was within the scope of the submission, and which the party affected by it omitted to bring before the arbitrator; as where the reference was "of all actions and causes of action between the parties," and after the award was made, by which one of the parties had to pay a sum of money to the other, the party paying the money wished to deduct an amount due to him from the opposite party, and which had

Effect of the award when all the matters in difference not brought before arbitrator.

not been brought before the arbitrator, the Court held that it was within the scope of the reference and should have been brought forward and discussed before the arbitrator, and would not allow the arbitrator's decision to be questioned. (*Smith v. Johnson*, 15 *East*, 213.)

Award will not convey real property.

The award of an arbitrator does not transfer the rights of a party to land, and will not operate as a conveyance, except it be under some statute which gives to the award the effect of a conveyance. (*Rolle's Abr. Arb.*, a. 3, 242.) But a conveyance may be awarded if the terms of the submission give that power. (*Marks v. Marriott*, 1 *Lord Raymond*, 115.) The award does not of itself convey the property in a chattel; it gives a possessory title only, which may be enforced by an action. (*Hunter v. Rice*, 15 *East*, 100.)

Award is not a deed of transfer.

Rights of strangers not affected by award.

It may be stated, as a general rule, that the rights of strangers are not affected by the award; and, in cases where an award contains a direction affecting a stranger to the reference, it has been held void as to such direction, and the rest of the award upheld if the parties to the reference have not thereby been injuriously affected.

When award orders payment of money, it creates a debt provable in bankruptcy.

Where an award orders payment of a sum of money by one person to another, so as to give the creditor a right of action for its recovery, it creates a debt which can be proved in bankruptcy, and is a good petitioning creditor's debt. (*Antram v. Chase*, 15 *East*, 208.)

A valid award is of same force as judgment of Court.

An award that is valid is of the same character as the judgment of a Court of Justice, and is conclusive evidence as between the parties to it as to all matters

included in the submission. The parties whose duty it is to obey the award should do all acts necessary to carry out the intention of the arbitrator; and if a certain thing is directed to be done, and no time is mentioned for its performance, it should not be unnecessarily postponed, but should be carried out in a reasonable time. Where both time and place are mentioned for an act to be done such as the payment of money, the party making the payment should be there at the time specified, even though the one to whom the money is payable is not there to receive it (*Doyley v. Burton*, 1 *Lord Raym.*, 533); and if no time and place for the payment of money is named in the award, it is considered payable on demand.

Parties affected by award to do all necessary acts.

Payment of money at specified time and place.

If no time and place mentioned in award, money payable on demand.

When part of the award is good and part is bad, the performance of the good part will be sufficient. The performance of the award may take place, part at one time and part at another, for the nature of it may require performance at different times and places. (*Bacon's Abr. Arb.*, F.) An award must receive a liberal construction, and the parties must show an intention to obey it as far as possible. If the award be to pay money to a certain person who afterwards dies, the money should be paid to his executors as his legal personal representatives.

Where award part good.

Performance of award may be at different times.

Parties to award must show disposition to obey it.

CHAPTER XI.

ENFORCING THE AWARD.

WE have mentioned in previous chapters, that in order to give the Court jurisdiction over the proceedings in an arbitration, it is necessary to make the submission a rule of Court, and until that event takes place, the Court is powerless either to interfere in the proceedings, or to set aside, refer back, or enforce the award.

Submission may be made rule of Court at any time before or after award.

The submission may be made a rule of Court at any time during the reference, and on the application of either of the parties (*Pownall v. King*, 6 *Ves.*, 10), either before or after the award has been made, and whether the intention of such application be to enforce it or otherwise.

When the award is made in a compulsory reference under the C. L. P. Act, 1854, the Court has power, under the statute, to make it a rule of Court.

Submission may be made rule of Court by motion.

The submission is made a rule of Court by motion, and it is not necessary to give notice to the opposite side of the intention to make such motion. For the purpose of making the submission a rule of Court, it

Formerly one of witnesses had to make affidavits.

was formerly necessary that one of the witnesses should make an affidavit of its execution in the Court of which it was intended to be made a rule, in all cases where the submission was by consent; but by the C. L. P. Act, 1854, it is not now necessary that the attesting witness be the party making the affidavit. (*Newton v. Hetherington*, 19 *C. B.*, *N. S.*, 342.)

The submission may be made a rule of Court either in vacation or term time; if the former, it must be dated the day of the month and week that it was delivered out, but it should be entitled as of the term immediately preceding the vacation. (*In re Taylor*, 5 B. & A., 217; *Reg. Gen.*, H. T., 1 Vict., c. 3.)

Can be made a rule of Court either in vacation or term.

If the submission be lost and it is desired to make it a rule of Court, it will be necessary to produce a verified copy, and the Court will accept it instead of the original. Also, when an arbitrator refuses to give up the award without the payment to him of an exorbitant charge, the Court will accept a verified copy. (*Thomas v. Philby*, 2 Dowl., 145; *Robinson v. Davis*, 1 Stra., 526.) And if one of the parties has the submission and refuses to give it up in order that it may be made a rule of Court, the Court will grant a rule, calling on him to produce it. (*Lord Boston v. Mesham*, 8 Dowl., 867.) The enlargement of the submission as to time by the arbitrator, the appointment of umpire, and the submission, may all be included in one rule, and may be made a rule of Court at the same time. (*In re Smith v. Reeves*, 5 Dowl., 513.)

If submission is lost, verified copy to be produced. Where arbitrator refuses to give up award.

Where one party refuses to give up submission.

The submission can also be made a rule of the Chancery Division of the High Court, in which case it has to be filed in the Report Office before the order is passed and is on motion with notice to the opposite side, unless the submission provide that no notice is necessary. (*Daniel's Chancery Practice*, p. 752, 6th Edit.)

Submission made rule of Court in equity.

After the submission has thus been made a rule of Court, the award can be dealt with by the Courts as

After submission has been made rule of Court

Can be dealt
with by the
Court.

How award
can be
enforced.

Action will
lie where sub-
mission is by
consent.

Submission
by deed
action for-
merly lay on
covenant.
Practice since
Judicature
Acts.

Endorsement
of Statement
of Claim.

Award
enforced by
attachment.

circumstances may require; it can be referred back; it can be set aside; it can be enforced; and the parties refusing to perform their part of the award can be dealt with by the Courts and compelled to render obedience. We have dealt with the various points above mentioned in previous Chapters, and we will now proceed to consider, "How the award may be enforced." It can be enforced in various ways, *e.g.*, where the submission cannot be made a rule of Court, as in cases where it is made by parol, or contains a clause that it shall not be made a rule of Court, an *action* seems to be the only means of enforcing the award. An action can also be maintained where the submission is by consent; by deed; by bond; or by order of the Court or a Judge, and an action to compel performance of the award may be maintained, at the same time that the party disobeying it is imprisoned under an attachment for not performing it. (*R. v. Hemsworth*, 3 C. B., 745.)

When the submission was made by deed, the action of covenant lay for the non-performance of the award, or the breach of any part of it. (*Charnley v. Winstanley*, 5 East, 266.) Now, since the Judicature Acts in an action on an award, the writ of summons may be endorsed:—"The plaintiff claims £ for money payable under the award, or £ for damages for non-performance of the award." (*Russell on Arbitrations*, 6th Edit., p. 541.) An award can also be enforced by attachment, which will only be granted when the award has been made a rule of Court, and disobedience to the award in that case makes the party so disobeying guilty of contempt of that division of

the High Court of which the submission is made a rule, such contempt being punished by an attachment, and the party in contempt will be confined in prison until he comply with the award. (*Bacon's Abr. Arb., H.*) Though the award be parol, still, if the submission can be made a rule of Court, an attachment may be granted to compel performance of the award. (*Rawling v. Wood, Barnes, 54.*)

Not obeying award contempt of Court.

If award is parol, attachment may be granted.

The payment of the costs awarded will be enforced by an attachment, and if one of the parties have paid all the costs of the reference, payment of the moiety by the opposite side can be enforced by an attachment (*Hicks v. Richardson, 1 B. & P., 93.*) The payment of interest due after the award has been made cannot be enforced by this process (*Churcher v. Stringer, 2 B. & Ad., 777*); neither will an attachment be granted if the offending party has done his best to perform the award (*Dodington v. Bailward, 7 Dowl., 640*). And the Court will not grant an attachment if the award is not good, nor if it is doubtful. (*Standley v. Hemmington, 6 Taunt, 561.*) An attachment would not be granted by reason of one of the parties not making a payment on 'a Sunday (*Hobdell v. Miller, 2 Scott, N. R., 163.*) It is quite within the discretion of the Courts as to whether they will grant an attachment or leave the party to his remedy by action. (*Stock v. De Smeth, Hardw., 106.*) And an attachment would be refused where the application was not made until after a considerable time had elapsed since the award was made, unless such delay could be explained to the satisfaction of the Court. (*Storey v. Garrey, 8 Dow., 299.*)

Payment of costs enforced by attachment. Party paying the whole of costs. Payment of interest falling due after award, not enforced.

Courts have discretion as to granting attachment.

Award must be distinct as to act to be performed.

Where no specific direction given in award,

attachment must be applied for by one of the parties.
Not granted to stranger.

When party refuses obedience to awards.

No attachment against Peers or Members of Parliament,

or executor of deceased party.

Where executor refers to arbitration, is personally liable.

If the award is ambiguous and does not distinctly order the act that has to be performed, the Court will not grant an attachment to enforce such performance; and where an award found that a certain sum was payable from one party to the other, but gave no specific direction for the payment of the amount the Court would not grant an attachment to enforce payment. (*Graham v. Darcey*, C. B., 537; *Seaward v. Horney*, 7 Dowl., 318.) The attachment can only be granted on the application of one of the parties to the reference. A stranger cannot have an attachment, although the award has directed payment of a sum of money to him, of which sum he cannot obtain payment. (*In re Skeete*, 7 Dowl., 618.)

If the award order the payment of money, or the performance of any other act, which the party liable refuses to do, an attachment can be obtained to compel him; for an award having the same power as a judgment of the Court and enforceable by the same means, a refusal to obey any part of it is equally a contempt, and punishable accordingly. (*Dodding-ton v. Bailward*, 7 Scott, 733.) The Court will not grant an attachment against a member of the House of Lords or the House of Commons for non-performance of an award. (*Walker v. Earl Grosvenor*, 7 T. R., 171; *Catmur v. Knatchbull*, 7 T. R., 448.) An attachment will not be granted against the executor or administrator of one of the parties who dies after the award is made, but before having performed it. (*Newton v. Walker*, Willes, 315.) Where, however, an executor or administrator refers matters in connection with the estate to arbitration, he is held to

imply that he has sufficient assets in hand to meet the award, and if the award for the payment of a sum of money were given against him, he would be personally liable for the amount, and an attachment would be granted to compel performance of the award. The same principle applies to trustees. (*Spiney v. Webster*, 2 Dowl., 46.) An attachment will not be granted against a Corporation, nor against any of the members individually, for non-performance of the award. (*Guildford v. Mills*, 2 Keb., 1.) Neither will an attachment be granted against a party to compel him to perform the award where the action was referred without his knowledge or consent, and he was in ignorance of the proceedings until after the award was made. (*Robertson v. Hatton*, 26 L. J., Ex., 293.)

Attachment
not granted
against Cor-
poration,

nor against a
party in
ignorance of
proceedings.

Where an award is made against several parties, an attachment will lie against one of them to compel performance; and, if the party is out of the jurisdiction of the Court, the same rule holds good, as an attachment is a civil process only, and the Courts do not concern themselves with the question as to whether the attachment can be served. (*Richmond v. Parkinson*, 3 Dowl., 703; *Hopcraft v. Fermor*, 8 Moore, 424.)

Attachment
will lie
against one of
several
parties.
Attachment
is civil
process.

In an old case where a woman agreed to a reference, and the arbitrator, by his award, ordered her to deliver up two notes, and also to pay a sum of money, both of which acts she failed to do, but got married, and her husband refused to comply with the award, it was held doubtful whether an attachment would lie against both husband and wife, or against either. (*Bacon's*

Abr. Arb., H., Anon, 1 Crompton, 3rd Edit., 265.)

Party refusing to obey must be personally served with copy of rule and award.

The party who has to perform the award, and whose refusal to perform it makes further proceedings necessary in order to compel him, must be served personally with a copy of the rule making the submission a rule of Court; he must also be personally served with a copy of the award; both the copies must be correct ones. (*Thomas v. Rawlings, 28 L. J., Ex., 347.*)

Demand for performance to be made, either by the party or his attorney. Copy of power of attorney must be served. Original documents must be shown.

The party applying for an attachment must first have made a demand upon the party liable to perform the award, to obey it, such demand may be made either by the party himself or by some one acting for him by power of attorney; in the latter case a copy of such power of attorney must also be personally served upon the non-complying party. The original of the various copies mentioned, viz.—the copy of the rule of court—of the award—and of the power of attorney—must be shown to the party who has to perform the award in such a manner that he can read them. (*Lloyd v. Harris, 7 D. & L., 118; Ellis v. Giles, 5 Dowl., 255; Calvert v. Redfearn, 2 Dowl., 505.*)

Notice of enlargement where necessary.

Where the original time for making the award has been enlarged, notice of the enlargement and also that the award was made within such enlarged time should be given to the party liable to the performance of the award. (*Doddington v. Bailward, 7 Dowl., 640; Wohlenberg v. Lageman, 6 Taunt., 640.*) Such notice need not be in writing, but verbal notice is sufficient; or any form, in fact, that carries conviction to the mind of the party concerned. (*Doddington v. Bailward, supra.*) Tendering the copies of the

Verbal notice sufficient.

various documents, and leaving them with the party affected by them, is sufficient notice, even though he refuse to take them up. (*Ellis v. Giles*, 5 *Dowl.*, 255.)

Tender of
copies suffi-
cient notice.

Where the award directs payment of costs which have been taxed, a copy of the master's allocatur for them must be shown at the time when the demand for payment is made. (*Bass v. Maitland*, 8 *Moore*, 44.)

Copy of
Taxing
Master's
certificate
necessary
where costs
taxed.

Serving a copy of the various documents and showing the originals must take place at the same time: serving a copy of the award one day, and two days afterwards showing the original and making a demand for its performance, was held insufficient to obtain an attachment. (*Lloyd v. Harris*, 8 *Q. B.*, 63.)

Serving copies
and showing
originals
must take
place
together.

Where the personal service of the proper documents cannot be effected, an attachment will not be granted if there is a remedy by action, although the party to be served keeps out of the way purposely to avoid such service. (*Richmond v. Parkinson*, 3 *Dowl.*, 703.) The necessity for personal service of the various copies upon the party liable to perform the award is not done away with by the fact that a particular time and place are fixed by the award for such performance. (*Brandon v. Brandon*, 1 *B. & P.*, 394.) The demand for performance cannot be made until the time fixed for performance of the award has expired. If the plaintiff is directed to execute a conveyance "on or before a certain day," and he allows the day fixed to elapse without having tendered such conveyance for execution, he cannot afterwards apply for an attachment, neither has he any remedy. (*Doe d. Williams v. Howell*, 5 *Ex.*, 299.)

When attach-
ment not
granted.

Personal
service neces-
sary when
time and
place fixed
for per-
formance
has failed.
Demand can-
not be made
before time
fixed for
performance.

Demand must
be for pre-
cise thing.

There must be a demand for the precise thing, or, if money is awarded, the exact sum to be paid must be demanded before an attachment can issue. Where an award directed that a sum of money should be paid and also that a wine warrant, for a certain hogshead of wine lying in the London Docks, should be delivered to the defendant, the demand was made for the payment of the money and the delivery of a hogshead of wine, and the Court granted attachment for the payment of the money, but refused to do so for the hogshead of wine, as the thing awarded was the warrant, and not the wine itself. (*Hemsworth v. Brian*, 1 C. P., 131.)

No attach-
ment granted
while action
is proceeding,

The Courts will not grant an attachment for the performance of award when the party applying has taken proceedings in an action, as the party entitled to have the award performed must choose which remedy he will pursue, and cannot be allowed to enforce the award by action and by attachment at the same time. (*Badley v. Loveday*, 1 B. C. P., 81.)

except action
is stopped.

But in one case a rule for an attachment was granted, while an action was pending, on the plaintiff discontinuing his action and paying the costs incurred; (*Paull v. Paull*, 2 Dowl., §40); and in that case it was laid down that such was the more regular mode of procedure.

Motion for
attachment
supported by
affidavit.
Affidavit must
verify award,
and state
clearly all
facts relied
on.

The motion for an attachment should be supported by affidavit, such affidavit must verify the award and should show that the award was made within the time originally fixed; and where such time has been enlarged, it should verify such enlargement, also that the party in contempt had notice of the

enlargement, and that the award was made within the enlarged time. (*Davis v. Bass*, 15 *East*, 97.) It must also state clearly all the facts necessary to show that there has been contempt, such as non-performance of the award within the specified time, and after the demand to perform it had been duly made, and also that the copies of the various necessary documents have been served, and that the originals had been shown at the time of serving them. (*Re Smith v. Reeves*, 5 *Dowl.*, 573.)

The motion for attachment should be made by counsel, and there should be no delay in making the application. If the rule is made absolute, it should be drawn up by the proper officer of the Court. The costs of an attachment are in the discretion of the Court, and should be asked for at the time of making the motion. The attachment is generally directed to the sheriff, and should be taken to his office and properly stamped; a warrant will then be issued to one of the officers in the usual way, and the party in contempt duly arrested, but he cannot be arrested on a Sunday. (2 *Archbold*, 13th *Edit.*, 1393.) Cross motions for setting aside the award and for an attachment are often heard together. (*Creswick v. Harrison*, 20 *L. J., C. P.*, 56.)

The party opposing the motion for an attachment must show cause against it, and for that purpose any irregularity in the proper service of any of the necessary copies of documents, or want of personal notice, or of any defect existing on the face of the award, or of ambiguity in the award may be relied upon—in most cases successfully—in answer to a motion for

Motion for attachment to be made by Counsel.

Costs of attachment are in discretion of Court. Attachment should be directed to Sheriff.

Cannot arrest on Sunday.

Party opposing motion must show cause against it. What can be shown.

attachment, also that the party has performed the award as far as he possibly can do so, also that the award was not executed by all the arbitrators (where there are more than one) at the same time.

Mode of enforcing award or of payment of costs by execution.

Rules of Court, &c., have same effect as judgments as to payment of money or costs.

1 & 2 Vict., c. 100, s. 18.

Another mode of enforcing an award directing payment of a sum of money, or of costs, is by execution, where the submission to arbitration may be, or has been, made a rule of Court. It is provided by section 18 of 1 & 2 Vict., c. 100, "That all decrees and orders of Courts of Equity, and all the rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person shall have the effect of Judgment in the superior Courts of Common Law, and the persons to whom any such monies or costs, charges or expenses, shall be deemed judgment creditors within the meaning of this Act, and all powers hereby given to the judges of the superior Courts of Common Law, with respect to matters depending in the same Courts, shall and may be exercised by the Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all the remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses are by such orders or rules respectively directed to be paid."

When the rule (which is a rule *nisi*) to obtain payment has been applied for, and obtained, it appears best to serve it personally if possible; and the party against whom the rule is obtained may show cause against the rule, and in so doing has the same grounds of defence as we have seen he has in cases where attachment is moved for, and may make the same use of them in order to prevent the rule being made absolute; but he could not show cause against the rule on the last day of term. The rule is for six days, and the Court will not interfere without very good reason, to shorten the time. (*Arthur v. Marshall*, 2 D. & L., 376; *Kerr v. Jeston*, 1 Dowl., N. S., 340; *Jordan v. Berwick*, 1 Dowl., N. S., 271.)

Where rule *nisi* has been obtained,

party has same grounds of defence as against attachment.

Six days' rule.

An attachment will not lie against the executor or administrator of a party who has died since the award was given; as in the case of a contempt of Court, a personal act has been committed by the deceased, his legal personal representatives, therefore, cannot be made liable. (*Newton v. Walker, Willes*, 315.)

Attachment will not lie against executor of deceased party.

Although, as we have seen, an award does not *per se* act as a conveyance of land, and that in order to transfer land there should be a conveyance properly executed in pursuance of the award, there are cases in which an award has, by statute, the same force as a conveyance; *e.g.*, by the Act 41 Geo. 3, c. 109. A rule to deliver possession of land pursuant to an award may be enforced as a judgment in ejectment by the C. L. P. Act, 17 & 18 Vict., c. 125, s. 16, which provides, "When any award made on any such submission, document, or order of reference as aforesaid, directs that possession of any lands or tenements

Award does not operate as a conveyance.

When award directs possession of

land under
C. L. P. Act,
17 & 18 Vic.,
c. 125.

Has effect of
Judgment in
ejectment.

In a reference
at *Nisi Prius*,
award has
effect of
verdict.

capable of being the subject of an action of ejectment, shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court, of which the document authorizing the reference is, or is made, a rule or order, to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under, or put in possession by him since the making of the document authorising the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award; and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue and possession shall be delivered by the sheriff as on a judgment in ejectment." By the Railway Companies Arbitration Act, 22 & 23 Vict., c. 59, s. 26, full effect is given by all the superior Courts of law and equity to all references, arbitrations and awards, the performance of which may, when the Court thinks fit, be compelled by distress against the property of the companies, or by any other process against the companies respectively that the Court shall direct.

When a cause has been referred at *nisi prius*, and a verdict has been taken subject to a reference, the award of the arbitrator has the same effect as the verdict of a jury, and is enforced by the same means; and the successful party may enter up judgment and obtain execution for the amount owing, without the

leave of the Court being first obtained. (*Maggs v. Yorston*, 6 Dow., 481.)

Where the verdict is taken subject to a reference of the cause and all matters in difference, the party in whose favour the award is made, is entitled to sign judgment in fourteen days after the date of the award; and, when a certain day is fixed for the payment of a sum of money, the Court will not allow execution to be taken out before the day named in the award. (*Callard v. Paterson*, 4 Taunt., 318.) Execution can only issue for the sum awarded, and interest on such sum from the date of the award will not be allowed. (*Lee v. Lingard*, 1 East, 400.)

When day fixed for payment, execution not issued before.

Execution can only issue for sum awarded.

If the award is lost the Court will permit judgment to be entered up on an affidavit of its contents being produced. (*Hill v. Townsend*, 3 Taunt., 45.)

Award lost, Court will accept affidavit.

CHAPTER XII.

SETTING ASIDE THE AWARD.

As before stated, the Courts have no jurisdiction in a reference, nor in any steps in a reference until the submission has been made a rule of Court; so that that step is a preliminary to any assistance that may be required from the action of the Court or a Judge. Without that preliminary step, whatever injustice may have been inflicted upon any of the parties either by the conduct of the arbitrator or by his award, the party injuriously affected has no remedy.

Court has no jurisdiction until submission is made rule of Court.

Until submission is made rule of Court, award cannot be enforced.

Until the submission is made a rule of Court, the party cannot obtain either the enforcing or the setting aside of the award ; neither has he any means of compelling the opposite party to obey the award, or to carry out any part of it. When the submission has been made a rule of Court by application of the parties, or of one of them, or in cases where the reference is compulsory (under the C. L. P. Act, 1854), the Courts then have jurisdiction to interfere in the proceedings, and to remedy any real injustice that may have been inflicted upon any of the parties ; and one of their modes of remedy is by setting aside the award.

Award set aside on good cause.

Motion to set aside must be made in open Court.

Must be Court of which submission is rule.

Causes for which award will be set aside.

The award will be set aside by the Court or Judge on good cause shown, and the motion to set it aside must be made in Court, and not before a Judge at Chambers, and the Court must be the one of which the submission is made a rule. (*Cromer v. Churt*, 15 *M. & W.*, 310.)

The causes for which the award will be set aside are several :—where the award is defective—where it is uncertain—where it is not a final settlement of all the issues referred—and where it is bad ; also where the arbitrator has made a mistake as to his jurisdiction—where corruption or fraud is shown on the part of the arbitrator—where the proceedings have been conducted in an irregular manner—and where one party has obtained the decision of the arbitrator by a concealment or misrepresentation of facts.

Award will be set aside if defective,

The award will be set aside if it is defective ; *e.g.*, if it fails to give a final decision on all the issues contained in the submission ; if it reserve some point

for further decision; if the arbitrator, instead of deciding the matters himself, delegate his authority to another; if his award is not complete in itself; also where the arbitrator, being empowered to award costs, fails to do so or to fix their amount; these, and many other causes of want of finality in an award, are good grounds for setting it aside. If the award leaves it doubtful as to whether it has decided all the issues, or how they have been decided, and what is the real result of the proceedings so far as the parties to the reference are concerned; and also leaves doubtful what are their rights and what their remedies, it will be set aside; and also where the award is inconsistent or where one part contradicts another. It will be set aside also for corruption; fraud or partiality on the part of the arbitrator; as where he makes his award without having the evidence of the witnesses; where he acts in haste, not allowing one of the parties to finish his case; where he hears evidence privately, and without the knowledge of the opposite side; if he fails to give the party who is absent from the reference notice of his intention to proceed. There may be serious misconduct on the part of the arbitrator, amounting to legal fraud, where his conduct is otherwise unimpeachable (*Hall and Hinds, in re 2 M. & J.*, 847), and in such case his award will be set aside. The award, when *prima facie* good, cannot be set aside for a mistake by the arbitrator on a question of law or fact, where the mistake has been made on some matter within his jurisdiction, unless the mistake appear upon the face of the award. (*Kent v. Elstob*, 3 East, 18.) Unless upon the ground of fraud

if arbitrator
delegate
authority,

where award
is ambiguous,

where award
inconsistent,

on corruption,
fraud, or partiality of
arbitrator,
where arbitrator acts in
haste,
where he
hears
evidence
privately,
or proceeds
in absence of
one party,
where legal
fraud.

Award not
set aside for
mistake
when it is
within jurisdiction.

Court will not inquire into merits of case.

or corruption, the Courts will not inquire into the merits of the case when an application is made to set aside the award; as the parties have exercised their choice of arbitrator, and have chosen arbitration as a mode of settlement in preference to a court of law, they must abide by the decision of the tribunal that they have established. (*Sharman v. Bell*, 5 M. & S., 504.) As a rule the Courts will, if possible, uphold the award, and will not unduly interfere with it. (*Re Templeman and Reed*, 9 Dowl., 906.)

Will not set aside award on discovery of fresh evidence,

The Court will not set aside an award on the sole ground that fresh evidence has been obtained since the award was given, unless it can be proved that such evidence was not procurable before the arbitrator made his award. (*Eardley v. Otley*, 2 Chit., 42.)

nor on ground of surprise,

Neither will an award be set aside on the ground that one of the parties has been surprised by the nature of the evidence brought forward by his opponent, and which evidence he has reason to doubt; for he could at any time during the proceedings have made an application to the arbitrator for the purpose of inquiring into the truth, or otherwise, of the case unexpectedly set up, and having omitted to do so at the proper time he must take the consequences. (*Solomon v. Solomon*, 28 L. J., Ex., 129.)

nor where witness is a felon.

And where one of the parties to the submission, examined by the arbitrator, was a felon who had returned before the expiration of his sentence, and was at the time incompetent as a witness, the Court would not, on that ground alone, set aside the award; the arbitrator in that case having stated that he had made his award without reference to the evidence of either of

the parties, as he considered both of them unworthy of credit. (*Smith v. Sainsbury, 9 Bing., 31.*)

Neither will an award be set aside when perjury is alleged against one of the witnesses, as the party affected by it can obtain relief in the Courts by taking proceedings against such witness. (*Scales v. East London Waterworks Company, 1 Hodges, 91.*) But it will be set aside if one party has obtained the award in his favour by fraudulent concealment of material evidence, by which the arbitrator has been deceived and his decision influenced. (*South Sea Co. v. Bumstead, 2 Eq. Cas., Ab., 80.*)

Award not set aside on allegation of perjury.

Will be set aside on fraud, or concealment of evidence.

In order to prevent the necessity for application to the Court to set aside an award, it will be well that the submission should contain a clause enabling the Court, or a Judge, to refer back to the arbitrator, for reconsideration and redetermination, where necessary, the matters submitted to him. By that means the necessity for moving to set aside an award, except for some good reason, is done away with, and the Court, or Judge, will refer back the award to the arbitrator for correction.

Submission should enable Court or Judge to refer back award.

The parties to a submission cannot move to set aside the award on the ground of fraud, or corruption, or irregularity, or for any other cause, if, with a knowledge of any such objections, they have taken part in, or allowed the proceedings to go on without making any protest at the time, as by their subsequently taking part in the reference they have waived their right to object.

Objection waived by subsequent conduct.

The parties to the submission may move to set an award aside, but the motion cannot be made by a

Parties to submission may move to set aside award.

Motion cannot be made by stranger to submission.

stranger to the submission, nor, it appears, by one of the parties to it, if the mistake on which he relies for the purpose is a mistake in his favour. (*Moore v. Butlin*, 2 N. & P., 436.)

TIME WITHIN WHICH MOTION TO SET ASIDE THE AWARD MUST BE MADE.

Motion to be made before last day of following term.

If award made in vacation, motion to be made before next term expires.

Where arbitration is procured by fraud.

The motion to set aside an award must be made before the last day of the term following that in which the award is made. That applies to cases where the award is made in one of the law terms; but if the award is made in vacation, then the application to set it aside should be made before the last day of the term next ensuing.

By 9 & 10 Wm. III., c. 15, s. 2, it is provided that "any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made, and published to the parties; anything in this Act contained to the contrary notwithstanding." In order to bring the submission under this section it must be in writing and contain a clause enabling the parties to make it a rule of Court. (*Smith v. Whitmore*, 33 L. J., Ch., 218.)

Party against whom award is made to make motion.

The party against whom the award has been made is the one to make the motion, and can either appear

personally or by counsel. The motion must be made in open Court, and supported by affidavits verifying the award and stating the evidence on which the party moving relies, and the facts necessary to sustain the objections which he intends to make to the award. The motion to set aside an award cannot be made before the submission is made a rule of Court, except in case of a compulsory reference under the Common Law Procedure Act, 1854.

Motion to be made in open Court.

In cases within the statute 9 & 10 Wm. III., c. 15, s. 2, an application to set aside the award must be made within the time limited by it, and cannot afterwards be entertained on any account whatever, although the objections to the award were patent on the face of it. (*Pedley v. Goddard*, 7 T. R., 73; *Lowndes v. Lowndes*, 1 East, 276.)

Application to set aside award limited by 9 & 10 Wm. III., c. 15, s. 2.

The time for setting the award aside commences with the publication of it; that is, the date when the parties to the reference received notice from the arbitrator that the award was ready for delivery. (*MacArthur v. Campbell*, 5 B. & Ad., 518.)

Time for setting aside begins with publication of award.

Although by the Judicature Acts, 1873, law terms as they previously existed are abolished, they still continue to be referred to in all cases in which they were formerly used as a means of calculating the time within which some act has to be done, *e.g.*, an award was made on the 28th March, 1877, and an application to set it aside under the above statute was made in the Easter Sittings of that year, after the 8th May. Before the Judicature Acts, Easter Term in 1877 would have begun on the 15th April and ended on the 8th May. Held that the application

Terms abolished by Judicature Acts

are still referred to as a measure of time.

Motion to set aside cannot be made later than the term after publication.

ought to have been made on a day before the 8th May, for "terms" still exist as a measure for determining the time within which an award should be set aside under 9 & 10 Wm. III., c. 15, s. 2. (*In re College of Christ, Brecknock, v. Martin*, 3 Q. B. Div., 16.) An application to set aside the award cannot be made, even with the consent of both parties, later than one term after the publication of the award. (*In re North British Railway Co. and Trowsdale*, 1 C. P., 401.)

Longer time for cases not within statute.

In cases not within the statute 9 & 10 Wm. III., c. 15, s. 2, the Courts have a greater latitude as to the time within which the motion for setting aside the award can be made; but in order to make such motion successful there should not be unnecessary delay in making it, and, when a delay does take place, very clear and satisfactory reasons should be given for it. (*Reynolds v. Askew*, 5 Dougl., 682.) But the Courts will only accept very strong evidence of the cause of, and necessity for, the delay; and even where the arbitrator charged excessive fees and refused to give up the award until they were paid, the Court held that it was not a sufficient excuse for the delay in making the application. (*McArthur v. Campbell*, 5 B. & Ad., 518.) Where reference is a reference of the cause at *Nisi Prius*, the motion to set aside the award is considered a motion for a new trial, and must be made within four days after the publication of the award, if in term time; or if published in vacation, four days after the next term commences. (*Paxton v. Great North of England Railway Co.*, Q. B., 938.)

Party must show very strong evidence as to necessity of delay.

Motion to set aside award of cause at *Nisi Prius* is motion for new trial.

The C. L. P. Act, 1854, c. 125, s. 9, pro-

vides that "All applications to set aside any award, made on a compulsory reference under this Act, shall, and may, be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties." The "publication of the award to the parties," as we have shown, dates from the time when they receive notice of the award being ready for delivery.

Application to set aside award, under C. L. P. Act, must be made in first seven days of following term.

When the motion to set aside the award comes before the Courts, the Court, or a Judge, will give a construction to the award as favourable as possible to the parties to the reference, and will construe the award so as to take away, if possible, the necessity for setting it aside. They will not set it aside unless it be shown to be void on the grounds on which it is impeached. The party who opposes the motion to set aside, should, when such motion is made, show cause against it, and after cause is shown the Court will either discharge the rule or make it absolute, at their discretion.

Courts will not set it aside unless void.

Party opposing motion to show cause against it.

If the arbitrator make an award which is good in some parts and bad in others, or where he has awarded on a matter not submitted to him, and if the two parts can be separated, the bad part will be rejected and the remaining part will be allowed to stand good. (*Godlard v. Mansfield*, L. M. & P., 25; *Caledonian Railway Co. v. Lockhart*, 3 Macq., 808.) But if the two parts are so mixed up that they cannot be adjudicated upon without affecting the validity of the whole

Award good in part and bad in part, how dealt with.

award, the entire award will be set aside. (*Tandy v. Tandy*, 9 *Dowl.*, 1044.)

Court has discretion as to costs.

When the Courts discharge a rule they have discretion as to granting costs, and will usually, when the rule is discharged, discharge it with costs, when the application to set aside has been made on insufficient grounds. (*Snook v. Hellyer*, 2 *Chit.*, 43.) But where the rule to set aside an award or a cause is discharged, and nothing is said about costs, they will be costs in the cause. (*Clark v. Owen*, 2 *H. & W.*, 324.)

Court will not entertain second application to set aside award.

The Court will not, as a general rule, entertain a second application to set the award aside on the ground that further objections can be sustained, (*Snook v. Hellyer*, *supra*.) but will assume that all the objections capable of being made were made on the first application. (*R. v. Great Western Railway Co.*, 1 *D. & L.*, 874.)

Acquiescence of party a bar to his moving to set aside.

Acquiescence in the award shown by one of the parties taking a benefit under it, such as acceptance of the money awarded (even though that acceptance was under protest) or accepting the costs of the award, has been held sufficient admission of the validity of the award to debar the party so acquiescing from moving to set it aside. (*Kennard v. Harris*, 2 *B. & C.*, 801.)

JURISDICTION OF COURTS OF EQUITY IN SETTING AWARD ASIDE.

Power of Courts of Equity to annul an award.

The Courts of Equity have always had an extensive power to relieve against an award, even in cases

where the submission cannot be made a rule of Court, and this power exists at the present time (*Hamilton v. Bankin*, 3 De G. & Sm., 782), and that whether the submission is by order of the Court, or Judge, or order of *Nisi Prius*, or by rule of Court. But where the submission is made a rule of Court under 9 & 10 Wm. III., c. 15, equity has no jurisdiction to grant relief, neither has it any jurisdiction where the parties have agreed that the submission may be made a rule of Court of common law in pursuance of the statute. (*Davis v. Getty*, 1 S. & S., 411; *Hemming v. Winnerton*, 16 L. J., Ch., 90.)

The causes that will induce the common law Courts to set aside an award, will have the same effect in the Courts of Equity, and any of the grounds mentioned as influencing the former Courts—such as improper conduct of the arbitrator or the parties to the reference, &c.—could be relied on to set aside the award in equity. If the reference be made a rule of Court in Chancery Division, the proper mode of procedure is by motion, notice of which must be served on the arbitrator and also on the parties to the reference, and the motion must be supported by affidavits. It is not necessary that the notice of motion should state the grounds relied upon for setting the award aside (*Crawshay v. Collins*, 3 Swanst., 90); and where the submission is made a rule of Court in the Chancery Division, under the statute, the order confirming the award is final, and there can be no appeal therefrom to the House of Lords. (*O'Sullivan v. Hutchins*, 7 Cl. & F., 85.)

Equity will grant relief on same causes as Courts of Law.

Party to proceed by motion.

Notice of motion need not state grounds of application.

SPECIFIC PERFORMANCE OF AN AWARD.

Power of
Courts of
Equity to
enforce
award.

Will look
upon the
award as an
agreement.

No specific
performance
of award com-
pelled unless
reasonable,

nor where
award is
excessive.

Where there
has been
part perform-
ance of award,
equity will
enforce spe-
cific perform-
ance.

Parties must
not delay
application.

The Court of Chancery has power to compel the specific performance of an award when the thing ordered to be done by the award is of such a character as the Court would have enforced had it been an agreement between the parties. Where anything is awarded to be done specifically, as the conveyance of land or the making of a lease, the Court will regard the award as the agreement of the parties, and enforce it as such, unless the award is void for uncertainty. (*Hall v. Hardy*, 3 P. Wms., 190; *Hopcraft v. Hickman*, 2 S. & S., 130.) The Court will not compel specific performance of an award where the agreement contained in the submission is such in its nature as, owing to its unfairness or unreasonableness, will prevent the Court interfering in respect of the award made in pursuance of it. Neither will the Court interfere where the award is excessive or defective. (*Nickels v. Hancock*, 7 De G., M. & G., 300.) And, although part of the award is good, equity will not enforce the good part, if it cannot enforce the whole.

Where there has been a part performance of an award, the Court of Equity will interfere to compel specific performance (*Norton v. Mascall*, 2 Vern., 24), although the award is not binding in form of law. The Court will not compel specific performance of an award unless the parties avail themselves promptly of its assistance. (*Eads v. Williams*, 24 L. J., Chan., N. S.) Unless the effect of the action of the Court would be to grant relief to both parties,

it will not interfere to compel specific performance.
(*Blackett v. Bates, L. R., Ch., 1 App., 117.*)

If an award direct some illegal act to be done, the Court will not decree specific performance of it (*Walters v. Morgan, 2 Cox, 369*); but if the acts are legal, the Court will not itself inquire into their reasonableness, since it considers the determination of the arbitrator as conclusive; he being the Judge chosen by the parties. (*Blondell v. Brettargh, 17 Ves., 242.*)

Award direct-
ing illegal
act to be
done.

APPENDIX A.

3 & 4 WM. IV., c. 42.

*An Act for the further amendment of the Law
and the better advancement of Justice.*

Sect. 39. "And whereas it is expedient to render references to arbitration more effectual," be it further enacted, That the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court, or Judge's order, or order of *Nisi Prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of His Majesty's Courts of Record, shall not be revocable by any party to such reference without the leave of the

Submission to
arbitration by
rule of Court
not to be
revocable
without leave
of Court.

Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any Judge thereof, may from time to time enlarge the time for any such arbitrator making his award.

Power to
compel atten-
dance of
witnesses.

Sect. 40. And be it further enacted, that when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of Court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order; provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses and for loss of time, as for and upon attendance at any trial; provided also, that the appli-

cation made to such Court or Judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such Court or Judge that such person cannot be found; provided also, that no person shall be compelled to produce under any such rule or order any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order.

Sect. 41. And be it further enacted, That when in any rule or order of reference, or any submission to arbitration, containing an agreement that the submission shall be made a rule of Court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrators or umpire, or any one arbitrator, and he or they are hereby authorized and required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly."

Power for
arbitrators
under a rule
of Court to
administer an
oath.

9 & 10 Wm. III., c. 15.

An Act for determining Differences by Arbitration.

Sect. 1. Whereas it hath been found by experience that references made by rule of Court have contributed much to the ease of the subject in the determining of controversies, because the parties become thereby

obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt, in case they refuse submission; now for promoting trade and rendering the awards of arbitrators the more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in Parliament assembled, and by authority of the same, that from and after the 11th day of May, which shall be in the year of our Lord one thousand six hundred and ninety-eight, it shall and may be lawful for all merchants and traders, and others, desiring to end any controversy, suit, or quarrel, or controversies, suits, and quarrels, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of His Majesty's Courts of Record which the parties shall choose; and to insert such their agreement in their submission, or the condition of their bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof made by the witnesses thereunto, or any one of them, in the Court of which the same is agreed to be made a rule,

Merchants and traders, &c., may agree that their submission to award may be made rule of Court.

Such their agreement to be inserted in submission.

Regulations thereupon.

and reading and filing the said affidavit in Court, be entered of record in such Court: and a rule shall thereupon be made by the said Court, that the parties shall submit to, and finally be concluded by, the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of Court when he is a suitor or defendant in such Court; and the Court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other Court, either of law or equity, unless it shall be made to appear on oath to such Court that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption or other undue means.

Penalty for disobedience,

except in cases where award was procured by corruption.

Sect. 2. And be it further enacted by the authority aforesaid that any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void, and of none effect, and accordingly be set aside by any court of law or equity: so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties; anything in this Act contained to the contrary notwithstanding."

Corrupt arbitration void.

17 & 18 VICT., c. 125.

The Common Law Procedure Act, 1854.

As we have had occasion to mention this Act many times in the foregoing pages, we give here, in their entirety, such of the sections of the Act as bear upon arbitration.

Court or
Judge can
refer to arbi-
tration before
trial.

Sect. 3. "If it be made to appear at any time after the issuing of the writ, to the satisfaction of the Court or Judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties or to an officer of the Court . . . upon such terms as to costs, and otherwise as such Court or Judge shall think reasonable; and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred.

Court or
Judge may
direct a
special case
to be tried.

Sect. 4. If it shall appear to the Court or Judge that the allowance or disallowance of any particular item in such account depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a jury, or by a Judge, upon the consent of both parties as hereinbefore provided, it shall be lawful for such Court or Judge to direct a case to be stated, or an issue or issues to be tried; and

the decision of the Court upon such case, and the finding of the Jury or Judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive.

Sect. 5. It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior Courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court."

Arbitrator
can state
special case.

Sect. 6. Provides that, when on the trial of an issue of fact, questions of account arising thereon are referred by the Judge to a referee upon such terms as to costs as such Judge shall think reasonable, the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the Judge to proceed to try and dispose of any other matters in question not referred, in like manner as if no reference had been made.

Judge may
refer ques-
tions of
account, and
try other
issues of fact.

Sect. 7. "The proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission, or document authorizing the reference, be conducted in like manner and subject to the same rules and enactments as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents, enforcing or

Proceedings
before an
arbitrator.

setting aside the award, and otherwise, as upon a reference made by consent under a rule of Court or Judge's order.

Court or Judge may refer back to arbitrator.

Sect. 8. In any case where reference shall be made to arbitration as aforesaid, the Court or a Judge shall have power at any time and from time to time to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or Judge may seem proper.

Application to set aside award.

Sect. 9. All applications to set aside any award made on a compulsory reference under this Act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties.

Award may be enforced within time for setting aside.

Sect. 10. Any award made on a compulsory reference under this Act may, by authority of a Judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding the time for moving to set it aside has not elapsed.

If, after agreement to refer, one party brings action, Court or Judge may stay proceedings.

Sect. 11. Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless

commence any action at law or suit in equity against the party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which the action or suit is brought, or a Judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matter so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or Judge may seem fit; provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require.

Sect. 12. If in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator,

On failure of parties or arbitrators, Judge may appoint single arbitrator or umpire.

such parties or arbitrators do not appoint an umpire or third arbitrator ; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one, then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively ; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any Judge of any of the superior Courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, or third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all the parties.

Where reference is to two arbitrators, and one party fail to appoint, other party may appoint arbitrator to act alone.

Sect. 13. When the reference is, or is intended to be, to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended the vacancy should not be supplied ; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party

shall have appointed an arbitrator and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the Court or a Judge may revoke such appointment on such terms as shall seem just.

Sect. 14. When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner.

Two arbitrators may appoint umpire.

Sect. 15. The arbitrator, acting under any such document or compulsory order of reference as aforesaid, or under any order referring back the award, shall make his award under his hand and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may by consent in writing enlarge the term for making the award; and it shall be lawful for the superior Court of which such submission, document, or order is or may be made a rule or order, or for any Judge thereof, for good cause to be stated in the rule or order

Award to be made in three months, unless parties or Court enlarge time.

for enlargement from time to time to enlarge the time for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed an enlargement for one month; and in any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party, or to the umpire, a notice in writing stating that they cannot agree.

Rule to deliver possession of land pursuant to award, to be enforced as a judgment in ejectment.

Sect. 16. When an award made on any such submission, document, or order of reference, as aforesaid, directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court of which the document authorizing the reference is, or is made a rule or order, to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference to deliver possession of the same to the party entitled thereto, pursuant to the award; and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue; and possession shall be delivered by the sheriff as on a judgment in ejectment.

Sect. 17. Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior Courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior Courts, it may be made a rule of that Court only; and if, when there is no such provision, a case be stated in the award for the opinion of one of the superior Courts, and such Court be specified in the award, and the document authorizing the reference have not before the publication of the award to the parties been made a rule of Court, such document may be made a rule only of the Court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior Courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration or award."

Agreement or submission in writing may be made rule of Court, unless a contrary intention appear.

8 & 9 VICT., c. 18.

Lands Clauses Consolidation Acts, 1845.

Sect. 23. "If the compensation claimed or offered in any such case (*i.e.*, the compulsory taking of lands for undertakings of a public nature) shall exceed £50, and if the party claiming compensation desire to have the same settled by arbitration, and signify such

Compensation exceeding £50 to be settled by arbitration or jury, at the option of party claiming compensation.

desire by notice in writing to the promoters of the undertaking before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation and the amount of the compensation so claimed, the same shall be so settled accordingly; but unless the party claiming compensation shall, as aforesaid, signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury as hereinafter provided."

Appointment of arbitrator when questions are to be determined by arbitration.

Sect. 24 provides for the method of procedure for settling disputes as to compensation by justices.

Sect. 25. "When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters, or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of

such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final.

Sect. 26. If, before the matters so referred shall be determined, any arbitrator appointed by either party die or become incapable, the party by whom such arbitrator was appointed may nominate and appoint, in writing, some other person to act in his place; and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed *ex parte*; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid.

Vacancy of
arbitrator to
be supplied.

Appointment
of umpire.

Sect. 27. Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act; and if such umpire shall die or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final.

In case of
death of
single
arbitrator.

Sect. 29. If, when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special Act, in the same manner as if such arbitrator had not been appointed.

If either arbi-
trator refuse
to act, the
other may
proceed
ex parte.

Sect. 30. If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse, or for seven days neglect to act, the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties."

Sect. 31. Provides, in cases where two arbitrators are appointed and fail to make their award within 21 days after appointment of last arbitrator, that the matter is to go to the umpire.

Power of
arbitrator to
call for
books, &c.

Sect. 32. "The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may

think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

Sect. 33. Before any arbitrator or umpire shall enter into a consideration of any matters referred to him, he shall, in the presence of a Justice, make and subscribe the following declaration; that is to say—

Arbitrator or
umpire to
make
declaration.

“I, A. B., do solemnly and sincerely declare,
That I will faithfully and honestly, and to the
best of my skill and ability, hear and determine
the matters referred to me under the provisions
of the Act [*naming the special Act*].

“A. B.

“Made and subscribed in the presence of
[]”

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire, having made such declaration, shall wilfully act contrary thereto, he shall be guilty of a misdemeanour.

Sect. 34. All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

Costs of
arbitration
how to be
borne.

Sect. 35. The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall

forthwith on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose."

Sects. 36 & 37 provide for the submission being made a rule of Court on application of either of the parties, and that no award shall be void through an error of form.

If further sum awarded, promoters to pay or deposit same within fourteen days.

Sect. 66. "If the arbitrators shall award that a further sum ought to be paid or deposited by the promoters of the undertaking, they shall pay or deposit, as the case may require, such further sum within fourteen days after the making of such award, or in default thereof the same may be enforced by attachment or recovered, with costs, by action or suit in any of the superior Courts."

22 & 23 VICT., c. 59.

Railway Companies' Arbitration Act.

Power of Railway Companies to refer to arbitration.

Sect. 2. "Any two or more railway companies, whether already or hereafter to be incorporated (in this Act called 'the Companies') from time to time, by writing under their respective common seals, may agree to refer to arbitration in accordance with this Act, any then existing or future differences, questions, or other matters whatsoever in which they then are, or thereafter shall be, mutually interested, and which they might lawfully settle or dispose of by agreement between themselves, and may delegate to

the person or persons to whom the reference is made any power to determine all or any of the terms of any contract to be made between the companies which the directors of the companies respectively might lawfully delegate to any committees of themselves respectively."

Sects. 3 & 4. The companies jointly, but not otherwise, have power under this Act, by writing under their common seals, to revoke, alter, or add to any agreement to reference, and, unless revoked, every agreement in accordance with the Act shall bind the companies.

Sect. 5. "Where the companies agree, the reference shall be made to a single arbitrator.

Reference to
a single
arbitrator.

Sect. 6. Except where the companies agree that the reference shall be made to a single arbitrator, the reference shall be made as follows:—

Where there are two companies, the reference shall be made to two arbitrators.

Where there are three or more companies, the reference shall be made to so many arbitrators as there are companies.

Reference to
two or more
arbitrators.

Sect. 7. Where there are to be two or more arbitrators, every company shall by writing under their common seal appoint one of the arbitrators, and shall give notice in writing thereof to the other company or companies.

Appointment
of arbitrator
by Companies.

Sect. 8. Where there are to be two or more arbitrators, if any of the companies fail to appoint an arbitrator within fourteen days after being thereunto requested in writing by the other company or by the other companies, or any of them, then, on

the application of the companies, or any of them, the Board of Trade, instead of the company so failing to appoint an arbitrator, may appoint an arbitrator; and the arbitrator so appointed shall for the purposes of this Act be deemed to be appointed by the company so failing."

Sects. 9 & 10. If any arbitrator dies the company that he represents may appoint another under their common seal, and if such company fail to appoint within fourteen days after request by the other companies, the Board of Trade may, on the application of the other companies, appoint.

Appointment
of arbitrator
not revocable.

Sect. 11. "When any appointment of an arbitrator is made, the company making the appointment shall have no power to revoke the appointment, without the previous consent in writing of the other company, or every other company in writing under their common seal."

Sects. 12, 13, 14, & 15. The arbitrators must then choose an umpire by writing under their hands before entering on the business, and if such arbitrators fail to appoint such umpire within seven days after the reference is made to them, the Board of Trade, on the application of any of the companies, may appoint. If the umpire dies or becomes incapable to act before arbitrators have finished the reference, they must appoint another; likewise if umpire fails for seven days to act as umpire, and if the arbitrators fail to make such appointment on the application of the companies, the Board of Trade may appoint.

Reference to
umpire.

Sect. 17. "Where there are two or more arbitrators, if they do not within such a time as the companies

shall agree on, or, failing such agreement within thirty days next after the reference is made to the arbitrators, agree on their award thereon, then the matters referred to them, or such of those matters as are not then determined, shall stand referred to their umpire."

Sect. 18. Gives the arbitrators and umpire power to call for books, documents, or evidence, examine witnesses, and administer oath, &c.

Sect. 19. "Except where and as the companies otherwise agree, the arbitrator, and the arbitrators, and the umpire respectively, may proceed in the business of the reference in such manner as he or they respectively shall think fit.

Procedure in the arbitration.

Sect. 20. The arbitrator, and the arbitrators, and the umpire respectively, may proceed in the absence of all or any of the companies in every case in which, after giving notice in that behalf to the companies respectively, the arbitrator or the arbitrators, or the umpire, shall think fit so to proceed."

Arbitration may proceed in absence of Companies.

Sect. 21. Provides that several awards may be made, one on each part of the matters referred, instead of one whole award.

Sect. 22. "The award of the arbitrator, or of the arbitrators, or of the umpire, if made in writing under his or their respective hand or hands, and ready to be delivered to the companies within such a time as the companies agree on, or, failing such agreement, within thirty days next after the matters in difference are referred to (as the case may be) the arbitrator, or the arbitrators, or the umpire, shall be binding and conclusive on all the companies.

Awards made in due time to bind all parties.

Agreements,
arbitrations
and awards
to have
effect.

Sect. 26. Full effect shall be given by all the Superior Courts of Law and Equity in the United Kingdom, according to their respective jurisdiction, and by the companies respectively, and otherwise, to all agreements, references, arbitrations and awards, in accordance with this Act; and the performance or observance thereof may, where the Courts think fit, be compelled by distress infinite on the property of the companies respectively, or by any other process against the companies respectively, or their respective property, that the Courts or any Judge thereof shall direct, and where requisite frame for the purpose.

Costs of
arbitration.

Sect. 27. Except where and as the companies otherwise agree, the costs of and attending the arbitration and the award shall be in the discretion of the arbitrator, and the arbitrators, and the umpire respectively.

Payment of
costs.

Sect. 28. Except where and as the companies otherwise agree, and if and so far as the award does not otherwise determine, the costs of and attending the arbitration and the award shall be borne and paid by the companies in equal shares, and in other respects the companies shall bear their own respective costs.

Sect. 29. The submission to any arbitration in accordance with this Act may at any time be made a rule of any of Her Majesty's Superior Courts of Record at Westminster, or, as the case may be, at Dublin, on the application of any party interested; and the Court may remit the matter to the arbitrator, or to the arbitrators, or to the umpire, with any directions the Court may think fit."

APPENDIX B.

FORMS.

FORM I.

*(Form of Submission generally used where the Reference is to
One Arbitrator.)*

By consent, let all matters in difference in this cause (or action) between the parties be referred to the arbitrement, final end, and determination of A. B., of _____, who is to make his award in writing on or before the _____ day of _____ or such further day as the said A. B. shall appoint; and by the like consent, let all deeds, books, and papers in the custody or power of either of the parties relating to the matters in question, be produced before the said arbitrator as he shall direct, to be ascertained by the oaths of the respective parties producing the same; and the parties and their witnesses, being first sworn, are to be examined as the said arbitrator shall direct; and, by the like consent, the costs of this cause (or action), and of this application, and of this reference, are to be in the discretion of the said arbitrator; and, by the like consent, no action is to be brought by either of the parties against the said A. B. for any matter or thing he shall do in, about, or touching any of the matters hereby referred to him; and, by the like consent, the said arbitrator is to have power from time

to time to enlarge the time for making his award as he shall think fit.

FORM II.

(Form where Reference is to Two Arbitrators.)

Let all matters in difference in this cause (or action) be referred to C., of , a person for this purpose nominated by the Plaintiff, and of D., of a person nominated for this purpose by the Defendant, or in case of their not agreeing to an award, then to the arbitrement of such umpire as shall be appointed by them, the said C. and D., in manner hereinafter mentioned; and the said arbitrators are to make their award in writing on or before the day of , or on or before such further day as they, the said arbitrators, shall from time to time, by any writing under their hands, appoint; and in case of the said arbitrators not agreeing in an award, the said umpire is to make his award, in writing, within the period hereinafter mentioned, that is to say, within three calendar months after the expiration of the time within which the power of the arbitrators to make an award shall have ceased; or within such extended time after the expiration of the said period of three calendar months as the said umpire shall from time to time, by any writing under his hand, appoint. Let all deeds, &c. (as in Form I). And the costs of this suit and of this application are to be in the discretion of the said arbitrators and umpire, or of such of them as shall award upon the matters in difference. And no action, &c. (Form I). And before the said arbitrators shall enter upon the matters referred to them, they are, by

writing under their hands, to appoint some person, to be approved of by them, to be such umpire as aforesaid, and such umpire shall, by writing under his hand, signify his acceptance of such appointment—liberty to apply—

FORM III.

(Form appointing Umpire on failure of Arbitrators to do so after Notice, C. L. P. Act, 1854, s. 12.)

Upon the application of the said E. F., of _____, (description), and it appearing that G., of _____, (description), the arbitrator appointed by the said E. F., and H. I., of _____, the arbitrator appointed by the said J. S. in the matter of the above arbitration, have not appointed an umpire in pursuance of a notice dated _____, signed by the said _____ and served upon each of them the said arbitrators; the Judge doth, pursuant to sect. 12 of the Common Law Procedure Act, 1854, and by consent, appoint _____, of _____, as such umpire.

FORM IV.

(Form making Submission an Order of Court, under the Common Law Procedure Act, 17 & 18 Vict., c. 125, s. 12.)

Upon motion this day made unto this Court by Counsel for _____, and upon reading an agreement, or submission to arbitration, dated _____ and signed by the above named _____, &c., as by affidavit of _____, filed, &c., now produced and read, appears, and upon hearing Counsel for _____. This Court doth (by consent) order that the said agreement or submission to arbi-

tration be made an order of this Court, to be observed and performed by all parties according to the tenour and true meaning thereof.

FORM V.

(Form for making Award an Order of Court.)

Upon motion, &c., by Counsel for _____,
and upon reading an award dated _____,
under the hand and seal of (name arbitrator), and an
affidavit of _____, verifying the execution of
the said award. Let the said award be made an order
of this Court, to be observed by all parties thereto
according to the true tenour and meaning thereof.

FORM VI.

(Order of Reference at "Nisi Prius.")

18— — —

In the High Court of Justice,

— Division.

— } At a sitting held at _____,
To Wit. } on the _____ day of _____, 18____,
A. v. B. } before _____

It is ordered by the Court, by and with the consent of the parties, their Counsel and Solicitors, that the jury find a verdict for the Plaintiff for the amount claimed, subject to the award or certificate, order, arbitrement, final end, and determination of _____, who is hereby empowered to direct that judgement shall be entered, for the Plaintiff or the Defendant, or a nonsuit entered as he shall

think proper, and to whom this action and all matters in difference between the said parties are hereby referred, so as the said arbitrator do make and publish his award or certificate, in writing, of and concerning the matters hereby referred, ready to be delivered to the said parties, or either of them, or if they or either of them shall be dead before the making of the said award or certificate, to their respective personal representatives requiring the same, on or before the day of _____, sitting next ensuing the date of this order, with liberty to the said arbitrator, under his hand in writing, to enlarge the time for making his said award or certificate.

It is also ordered that the said arbitrator shall have all the powers, as to certifying and otherwise, of a Judge of the High Court of Justice.

It is also ordered by the like consent that the said arbitrator shall have authority to hear, receive, and examine evidence touching the matters hereby referred, and that the said parties shall produce before the said arbitrator all such books, deeds, papers, and writings, in their or either of their custody or power, relating to the matters in difference, as the said arbitrator shall think fit to require.

It is likewise ordered, by and with the like consent, that the costs of the action shall abide the event and determination of the said award or certificate. And the costs of the reference and award or certificate shall be in the discretion of the said arbitrator.

It is likewise ordered that the said arbitrator may find generally for the Plaintiff or for the Defendant, and need not find upon any specific issues unless re-

quired to do so. The costs of any such specific issues (if found) to abide the event.

It is likewise ordered, by the like consent, that the said parties do and shall, on their respective parts, in all things stand to, abide by, obey, perform, fulfil, and keep the award or certificate, order, arbitrement, final end and determination of the said arbitrator so to be made and published. And that neither of the said parties do or shall proceed in or prosecute any action or suit against the said arbitrator, or against each other respectively, for any matter relating to the arbitration, or the award or certificate, to be made in pursuance of this order.

It is further ordered, by the like consent, that if either of the said parties shall, by affected delay or otherwise, wilfully prevent the said arbitrator from making his award or certificate, or shall not attend after reasonable notice, and without such excuse as the said arbitrator shall be satisfied with and adjudge to be reasonable, then the said arbitrator may proceed *ex parte*, and the parties occasioning the delay shall pay to the other such costs as the Court shall think reasonable and just.

And it is ordered, by the like consent, that the Court may be prayed that this order be made an order of Court. And that in the event of any other application to the Court on the subject of this order, the reference, or the award or certificate, the Court may (if it shall think fit) at any time, and from time to time, refer back to the said arbitrator the whole or any part of the matter of this order, upon such terms as the Court shall think proper.

It is also ordered that in the event of the said arbitrator declining to act, or dying before he shall have made his award, or certificate, the said parties may, or if they cannot agree the Court may, on application by either side, appoint a new arbitrator.

By the Court,

_____ Associate.

FORM VII.

(A Short Form of Submission by Consent.)

We, the undersigned, agree to refer all the matters in difference between us to the determination and award of

A. B.

C. D.

FORM VIII.

(A Larger Form of Submission by Consent.)

Memorandum of agreement made this _____ day
of _____, between A. B., of _____, and
C. D., of _____. Whereas certain disputes
and causes of difference have arisen, and still exist,
between the parties hereto, and it is agreed to refer
the same to arbitration. Now it is hereby agreed by
and between the said parties to refer the said disputes
and causes of difference to the award and determina-
tion of J. H., of _____, so that he make and
publish his award in writing duly signed by him, of
and concerning the same, ready to be delivered to us,
or either of us, or if we, or either of us, shall be dead
before the making of the said award, to our respective
personal representatives, who shall require the same
on or before the _____ day of _____ next, or on

such further day as the said arbitrator shall by writing, signed by him, endorsed on this agreement, from time to time enlarge the time for making his award. And it is further agreed that the said arbitrator may, by his award, order and determine what he shall think fit to be done by either of us respecting the said matters in difference, and also that the costs of the said reference and award shall be in the discretion of the said arbitrator, who may direct to whom and by whom, and in what manner the same shall be paid. And each of the parties hereto agrees with the other to stand to, abide by, perform, fulfil, and keep the said award, so to be made and published as afore-said. And it is further agreed that the said arbitrator shall be at liberty to examine the parties, either or both of them, and that the witnesses in the reference and the parties, if examined, shall be examined on oath or affirmation. And it is further agreed that the parties respectively shall produce before the arbitrator all books, documents, papers, maps, plans, and writings, in their custody, power, or control, relating to the matters referred, which the said arbitrator may require. And that the parties respectively shall do all other acts necessary to enable the arbitrator to make his award herein, and that neither of them shall wilfully or wrongfully do or cause to be done any act or delay that shall prevent the arbitrator from making a just award. And it is further agreed that the arbitrator shall be at liberty to proceed *ex parte* if either of the said parties shall refuse or neglect to attend the reference without reasonable excuse for such refusal or negligence. And each of

the parties hereto agrees with the other that he will not bring or prosecute any action in any Court against the other, or against the arbitrator, concerning the matters in difference, or any of them. And it is hereby further agreed that this agreement may be made a rule of the (Q. B., C. P., or Ex.) Division of the High Court of Justice, if the Court shall so please, on the application of either of the parties hereto, without notice to the other of them. And further, that in the event of either of the said parties disputing the validity of the award, and moving the Court to set the same, or any part thereof, aside, or in any other event, the said Court shall have power at any time, and from time to time, to remit the matters hereby referred to the re-consideration and re-determination of the said arbitrator, with, upon, and subject to such directions, terms, and powers, as to the said Court shall seem proper.

In witness whereof we, the parties hereto, have hereunto set our hands, the day and year first above written.

FORM IX.

(Appointment of Umpire.)

We, the within-named A. B. and C. D., do hereby nominate and appoint X. Y., of _____, to be umpire between us, in and concerning the matters in dispute and within referred.

Witness our hands this _____ day of _____ 18 ____
 A. B.
 C. D.

Witness, ——— ———

FORM X.

(Revocation of Submission.)

I, A. B., of _____, do hereby revoke, annul, and make void all the power and authority which, by a deed (or state the nature of the document) dated the _____ day of _____, made between me and C. D., of _____, were given to E. F., of _____, the arbitrator thereby appointed to award and determine on certain matters in difference between me and the said C. D., and I do hereby discharge and prohibit the said E. F. from making any award, or from further proceeding in the said reference. As witness my hand and seal this _____ day of _____ 18 ____.

A. B.

FORM XI.

(Notice of Revocation to Arbitrator.)

SIR,—I hereby give you notice that, by a writing under my hand and seal, I have revoked and annulled, and made void your authority as arbitrator, and I hereby discharge and prohibit you from further proceeding in the matters of the arbitration or reference between myself and C. D.

To E. F.

A. B.

FORM XII.

(Appointment by Arbitrator of time for attendance before him.)

In the matter of the reference before me, between A. B. and C. D., I appoint the _____ instant, at _____ o'clock in the forenoon, at my office, and

the day of next, at the same
time and place, for proceeding in this reference.

Dated

E. F.

To A. B. and C. D.
and their respective
Solicitors and Agents,
and all others whom it
may concern.

FORM XIII.

(Enlargement of time for making Award.)

I enlarge the time for making my award respecting the matters referred to me by the within order of reference, until the day of ,

Dated

E. F.

FORM XIV.

(Form of Award.)

To all to whom these presents shall come I, E. F., of _____, send greeting (*here recite the instrument under which the reference has been made—whether an agreement, or Judge's order, &c.—and state so much of its terms as may be necessary to show the authority of the arbitrator or umpire, with respect to the subject matter of reference and the time for making the award, power of enlargement of the time, and the manner of making the award.* Thus if the submission be by agreement begin as follows: Whereas by an agreement bearing date the _____ day of _____, and made between A. B., of _____, and C. D., of _____, after reciting that various differences

had arisen between them, &c., (*here state all the parts of the agreement necessary to show arbitrator's authority, and also recite the enlargements of time, if any, and then proceed:*) Now know ye that I, the said E. F., having taken upon myself the burthen of the said arbitration, and having heard and duly considered all the allegations and evidence of the said respective parties of and concerning the said matters in difference, and so referred as aforesaid, do make and publish this my award, in writing, of and concerning the said matters so referred to me, and do hereby award that, &c., (*here follows a distinct statement of the finding of the arbitrator on all the points referred to him*) for example,

I award and direct that the costs of the said action when taxed, be paid by the said defendant to the said plaintiff, and that the plaintiff and the defendant do each bear his own costs of the reference, and that the defendant do pay the costs of this my award; and that if the said plaintiff pays the said last mentioned costs, then that the defendant do forthwith repay him the amount which he shall so pay.

CLAUSES IN AN AWARD.

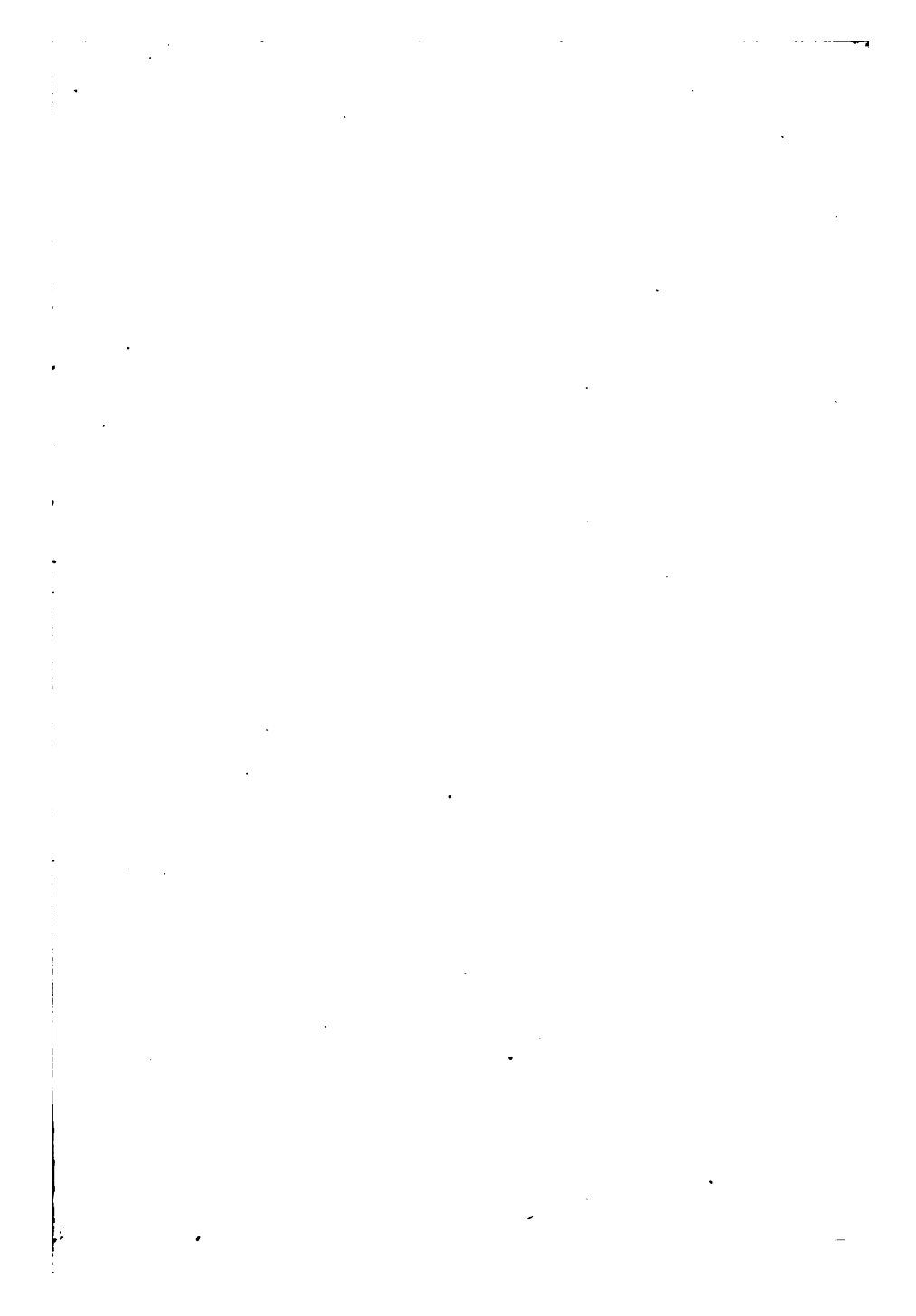
I award, order, and direct that there shall be a deed of conveyance by all necessary and proper parties of the said lands and tenements to such person or persons as shall be nominated by the parties of the first part, or such or so many of them as shall be then interested in or entitled to the said lands and tenements, to be executed on the day of , or

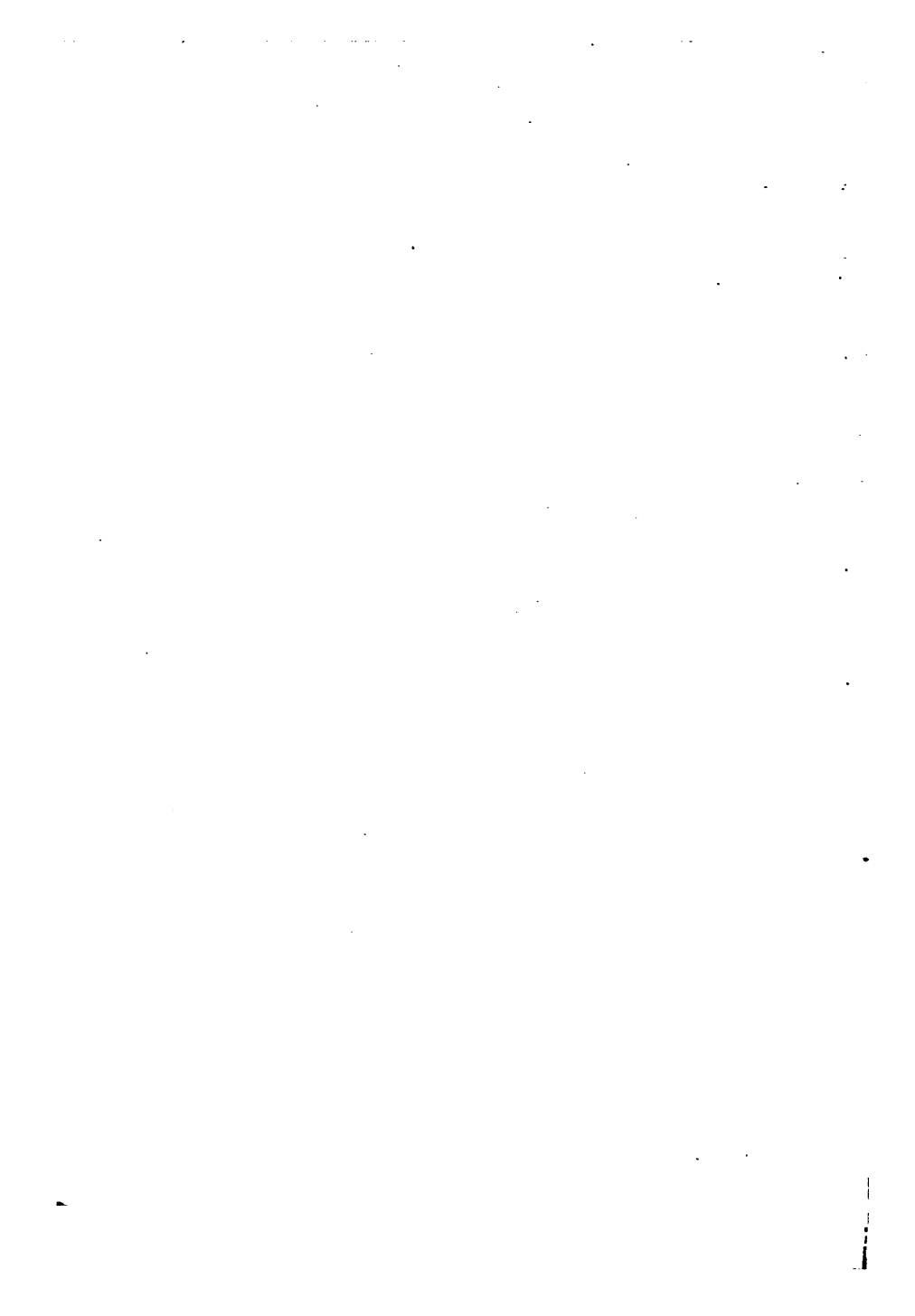
on such earlier day as aforesaid, and proper and effectual grants of the said ways and rights of way shall be executed by all necessary and proper parties, so as to vest in the said parties of the first and second parts respectively, and their respective heirs and assigns, mutual and reciprocal right of access, passage, and communication for themselves and their lessees and occupiers of the said lands, or any parts thereof, to and from their respective lands in the lines and directions indicated by the said roads, and to and from such public road or roads as aforesaid.

And I further award and determine that the respective parties to the said agreement shall bear their own costs of this reference, and that the costs of preparing and executing the said agreement and a duplicate copy thereof shall be borne by the said respective parties in equal moieties, and that if either of the parties shall have paid, or shall pay more than the half of those costs respectively, the excess shall be paid them by the other party on demand.

Signed and published by E. F., and duly attested.

LONDON:
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DB ASN RGe
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